Fenwick Elliott
The construction & energy law specialists

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Welcome to the September edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue looks at how to make expert evidence effective, including a review of the rules an expert should abide by, the recent developments in light of the Jackson Reforms, and a selection of practical pointers.

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Experts: the rules, recent developments and good practice

This 39th issue of *Insight* (i) reviews the rules by which experts should abide in relation to the preparation of their reports and the giving of their evidence; (ii) considers recent developments in light of the Jackson Reforms; and (iii) provides practical pointers on how to make expert evidence effective.

Experts have been making the headlines a lot over the past 18 months. They have been criticised for being biased, lacking relevant experience (due to working more as experts than in their true professional calling), giving no coherent thought to the issues in the case, seeking to defend the indefensible, being argumentative and unrealistic, and advancing arguments which are based on theoretically possible causes, as opposed to agreed facts.

This recent flurry of judicial criticism is of great concern, since in the construction industry in particular, disputes are usually very technical and expert evidence will often hold sway in determining the outcome of the case.

So how can you make expert evidence effective? Expert evidence can only be effective if experts are believable. Experts can only be believable if they abide by the various rules that govern them, and if they are perceived to be independent and accurate by the court. Failing this, their evidence is likely to be deemed to be unreliable, which may lead (either directly or indirectly) to an unsuccessful outcome.

The rules

The role of the expert witness

Essentially, the role of the expert witness is to help the court or tribunal understand complex technical issues in his chosen field, and to act independently when doing so. The role of the expert witness and his duties are dealt with in detail at Part 35 ("Experts and Assessors") of the Civil Procedure Rules ("CPR") and in the Practice Direction that supplements Part 35.

CPR 35.2(1) provides that an expert is:

> *"a person who has been instructed to give or prepare expert evidence for the purpose of proceedings".*

Section 13.1.1 of the Technology and Construction Court Guide describes expert evidence as:

> *"matters of a technical or scientific nature and will generally include the opinions of the expert".*

Experts' duties

Experts' duties are set out in CPR 35 and Practice Direction 35.

Rule 35.3 of the Civil Procedure Rules emphasises that the expert's primary duty is to help the court. This duty overrides any obligation the expert may have (or may perceive to have) to those instructing him, and experts therefore must not serve the exclusive interest of those who retain them.

CPR 35.3 provides:

> *"(1) It is the duty of experts to help the court on matters within their expertise.*
> *(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."*

Under CPR 35.10(2), experts must include a statement at the end of their report confirming that they understand and have complied with the duty under CPR 35.3.

CPR 35.3 is supported by Practice Direction 35 — Experts and Assessors, which states:

> *"2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.*
>
> *2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.*
>
> *2.3 Experts should consider all material facts, including those which might detract from their opinions.*
>
> *2.4 Experts should make it clear:*
>
> *(a) when a question or issue falls outside their expertise; and*
>
> *(b) when they are not able to reach a definite opinion, for example because they have insufficient information.*
>
> *2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court."*

Experts should also be aware of the overriding objective at CPR 1.1 which requires cases to be dealt with proportionally (at all times ensuring the work carried out and costs are in proportion

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to the value and importance of the case), expeditiously and fairly, and experts are obliged to assist the court in this regard.

In addition to the above, experts also owe an independent duty to those instructing them to exercise reasonable skill and care in the provision of their services, and to comply with any relevant professional code to which their profession might be subject.[1]

Recent developments

New TCC Guide

Much of the new TCC Guide that came out in May 2014 is repetitive of the above rules in relation to experts, but there are a few points that are worthy of mention.

Cooperation is emphasised. Wherever possible, the parties' experts should cooperate fully with one another (particularly where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed), and any laboratory testing or experiments should be carried out by the experts together, pursuant to an agreed procedure. Alternatively, the respective experts may agree that a particular firm or laboratory shall carry out specified tests or analyses on behalf of all parties.

Disclosure of initial or preliminary reports to opposing parties is encouraged prior to any pre-action protocol meeting (if only on a without prejudice basis), with a view to assisting in early settlement or mediation discussions and helping the parties to define and confine the issues in dispute with a corresponding saving in costs.

Expert meetings should be chaired by the expert of one party (usually the claimant) and the experts should exchange the agendas in advance, listing the topics each wishes to raise and identifying any relevant material which they intend to introduce or rely on during the meeting. Experts should meet at least once before they exchange their reports.

A summary of the expert's views on the main issues is helpful at the commencement of his evidence, particularly in large and complex cases where the evidence has developed through a number of experts' joint statements and reports. This can be done orally or by way of a PowerPoint or similar presentation.

Civil Justice Council "Guidance for the instruction of experts in civil claims 2014"[2]

The Civil Justice Council ("CJC") has recently announced a new Guidance for the instruction of experts in civil claims ("the Guidance") that will apply to experts in any discipline who are instructed to act in court proceedings. The Guidance will replace the current 2005 "Protocol for the Instruction of Experts to give Evidence in Civil Claims" ("the 2005 Protocol") which forms part of Practice Direction 35, and it is expected to come into force sometime this autumn.

The Guidance is intended to serve as best practice to assist litigants, experts and those instructing them to comply with CPR 35 and Practice Direction 35, any pre-action protocol that might apply (which in the Technology and Construction Court is the Pre-Action Protocol for Construction and Engineering Disputes) and also court orders. The Guidance does not represent a significant departure from the 2005 Protocol but it does reflect the decision in *Denton*,[3] and contains some important additions which were necessary as a result of the Jackson Reforms[4] more generally.

The key points are as follows:

- **Contingency fee agreement**s are strongly discouraged in order to protect against the widespread instruction of experts on a contingency fee basis.

Following the Jackson Reforms, the use of contingency fees has become legal in most civil cases, and the Guidance has made it clear that it would be a rare case where an expert could be instructed on a contingency fee basis because his independence would invariably be called into doubt.

- **Single joint experts** are encouraged and the Guidance states that single joint experts should be used wherever possible in the interests of narrowing the issues and saving time and thus costs. However, in light of the technical complexity of disputes in the Technology and Construction Court, single joint experts are not commonplace and are unlikely to become so, save for perhaps relatively straightforward and small quantum issues.
- **Costs budgets** now feature. The Guidance takes account of the greater use of costs budgets following the Jackson Reforms by requiring experts' instructions to confirm whether a budget is in place in respect of their fees.
- **The form and content of the report** goes further than the requirements of the CPR in that experts are required to clearly separate fact from opinion, and distinguish facts that are known to be true from those that are only assumed. If material facts are disputed, experts should express an opinion for each version of events, but they should resist favouring one version of events over another (unless they consider one set of facts is improbable or less probable, in which case they should confirm that with reasons). Further, experts should not be asked to amend their reports in any way which might distort their true opinion, except where this is necessary for the purposes of accuracy, clarity, consistency, completeness and relevance to the issues.
- **Without prejudice meetings** of experts are also taken further than the CPR in that the Guidance states that experts' meetings are the one occasion when it is permissible for experts to change their minds (and subsequently, their reports).
- **Finally, sanctions are acknowledged.** The Guidance acknowledges the Court of Appeal's decision in *Denton*,[5] by issuing a reminder that sanctions may follow from any failure to comply

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with court rules, practice directions and court orders. Such failures may include, for example, a failure to provide an answer to a question properly put, or excessive delay for which an expert is responsible. Corresponding sanctions may include a reduction in or disallowance of the expert's fee, or the expert's report and evidence being rendered inadmissible. At the very worst, if the court considers it has been misled, it may hold the expert in contempt of court, and if an expert appears to have been negligent, he may face a claim for professional negligence by those instructing him.

Practical pointers on how to make expert evidence effective

- The earlier you get an expert on board, the better. If you get a good expert early on, and prior to proceedings being issued, your case will be better prepared and you may be in a better position to encourage the other party to reach a cost- effective settlement.
- Experts are required to be, and most importantly be seen to be, independent. Do not be tempted to use any in-house resources you might have to act on your behalf in a quasi-expert capacity, as the court is likely to consider any in-house experts to be biased and their independence may be called into doubt.[6]
- Always make sure you instruct the right expert for the job, who has relevant experience in relation to the issues in dispute and who can give evidence based on his solid practical experience. You do not want to face criticism in court that your expert is from the wrong discipline, or has irrelevant experience.
- If you cannot find an expert that is sympathetic to your view, shop around. The permission of the court is not needed prior to retaining an expert. There are no rules preventing expert shopping prior to proceedings being issued, and any advice obtained from an expert before proceedings are afoot is entirely confidential. Therefore, if you do not agree with the view of any expert you retain prior to proceedings being commenced, shop around and see if you can find an expert who is sympathetic to your point of view.
- If you can, try and use a witness who has (i) given evidence before (and ideally has a good track record) and (ii) who has recent practical experience. Even very well-known, experienced witnesses may never have given evidence before a court or tribunal before, or may have given evidence many years ago, which will place them at a considerable disadvantage to their opponent.
- When the case gets going, it is of utmost importance following *Denton* that experts comply with CPR 35, Practice Direction 35, the overriding objective, any relevant professional code to which their profession might be subject, the Guidance (when it is in force) and any applicable court orders. If they do not, costs orders and other penalties and sanctions may follow.
- Be careful about experts who use assistants in the preparation of their reports. You do not want to discover when your expert reaches the witness box that your expert's assistant has written most of your expert's report and your expert is not familiar with it, as your expert will invariably lose credibility. Worse still, if your expert relies on others for assistance, and he does not declare that assistance was used at the outset of his report, his evidence may be dismissed.

Conclusion

With the Jackson Reforms now in full force, it is more important than ever that experts comply with CPR 35, Practice Direction 35, the overriding objective, any relevant professional code to which their profession might be subject, and the Guidance that will soon be in force.

There has yet to be a case, to my knowledge, in which sanctions have attached to a failure to comply with CPR 35, Practice Direction 35, or the overriding objective. However, recently, in *Hirtenstein and Another v Hill Dickinson LLP* [2014] EWHC 2711 (Comm), Leggatt J refused to attach any weight to the experts' opinions in the case because he found they were not supported by a transparent process of reasoning. Whilst Leggatt J did not mention any breach of CPR 35 or Practice Direction 35, a similar case where the judge does conclude there has been a breach to which sanctions should attach may not be in the too distant future as the judicial spotlight continues to shine on those experts whose performance is considered to be below par.

Footnotes

[1] For example, the professional code that the Royal Institute of Chartered Surveyors has recently issued to its members, entitled Surveyors acting as expert witnesses, for use in any form of tribunal and with which its members must comply or face possible disciplinary proceedings.

[2] A copy of the Guidance may be found at http://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/guidance-instruction-experts-give-evidence-civil-claims-2012/.

[3] As to which, see http://www.fenwickelliott.com/files/insight_issue_37.pdf

[4] See http://www.fenwickelliott.com/files/insight_issue_30.pdf.

[5] See http://www.fenwickelliott.com/files/insight_issue_37.pdf.

[6] A useful test for independence is whether the expert would express the same opinion if he or she was given the same instructions by another party, albeit this test would be difficult to prove in practice.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
lkingston@fenwickelliott.com.
Tel +44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com