

An Expert Tribunal and Expert Opinion Evidence

Part 1: Expert evidence and the Qualifications of an expert witness

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This first part of three papers¹ considers both the circumstances in which expert evidence may be helpful in the Lands Tribunal for Northern Ireland and the qualifications of an expert witness. The need for clear understanding between the expert and the advocate is addressed in part two, while part three suggests ways in which experts may better disclose their own judgment processes, analyse those of others and help the advocate make an informed prediction where the issue is a measured amount, such as a rent. The papers are intended for all those involved in bringing a case before this Tribunal but the principles are relevant to any circumstances in which IAVI members are asked to prepare expert evidence.

The circumstances in which expert evidence may be helpful

The functions of the Lands Tribunal² include resolving disputes about:

- rent reviews (as an arbitrator in private) usually of property in which government departments or public bodies have or had an interest;
- compensation for compulsory acquisition ranging from the value of large city shops to unfit houses;
- rating appeals including questions of valuation of commercial property and domestic property on appeal from the NI Valuation Tribunal;
- business tenancies including rent, duration and other terms for lease renewals; and
- restrictive covenants impeding the development of land and whether, for example, they secure sufficient continuing benefit.

In most Lands Tribunal disputes, some expert evidence is required because the key primary facts are usually in the nature of 'expert facts' that require surveying skills and knowledge of the locality, the property, and the relevant property market. Before any case is referred to the Tribunal, most users will have employed experts to try to resolve their dispute and the relevant material will have been identified. The resultant ultimate issue for the Tribunal usually turns on differences in the experts' opinions on the conclusions to be drawn from the facts. Although some users prefer their experts to act as advocates rather than experts, most expect the Tribunal to give their experts the opportunity to provide an opinion on how it should approach the facts and the measured conclusions it should reach.³

In most cases the Tribunal starts from the competing opinions of the experts and uses its expertise to craft a decision. But if an expert does not candidly

disclose his or her judgment processes or the Tribunal does not find them helpful, the Lands Tribunal is an expert tribunal and as such may use its own expertise to interpret the primary facts:

"... it has to be remembered that the surveyor member of the tribunal was an expert in his own right. He was entitled to form his own conclusion, based on the evidence and on his own view of the site."⁴

The relevance of expert evidence to the ultimate issue will vary from case to case. For example, where the issue is one of value, expert evidence about value may be expected to be pivotal but, for example, in rating valuation cases there is a statutory presumption that the valuation is correct.⁵ On the other hand, where the issue concerns the terms, other than duration, of a lease renewal much less weight may be attached to expert evidence about modern letting practices.⁶

Clearly, it is not the function of an expert to make the tribunal's ultimate decision for it. An expert's opinion need not be followed even if uncontradicted or in the absence of reasons for rejecting it - but that would be exceptional. Although a tribunal may rely on its own expertise, it must also properly consider all the expert evidence it has received and not act as if it were an independent expert free to disregard it.

But expert evidence may serve other purposes.

Bennion⁷ suggests that in the context of interpretation of legislation, expert opinion evidence of the meaning of words is admissible only where a term is a technical term. Also, land law is fertile ground for factual situations which the legislature desired to remedy, or a lack of a remedy for a social mischief or a purely legal defect. These may be of a technical nature and

expert evidence may be received to assist interpretation. For instance expert knowledge helped to explain the significance of references to poor law valuations in early 20th century restrictive covenants⁸ and the experience of the Tribunal triggered a legal debate about whether there was an error or mistake on the part of the draftsman in the notoriously complex legislation relating to controlled tenancies.⁹

In restrictive covenant cases and rent reviews,¹⁰ the correct interpretation of terms of the lease may be part of the dispute. Having regard to the modern principles of the interpretation of contracts,¹¹ expert opinion evidence may be helpful in interpreting matters in the background which would have affected the way in which the language of the lease would have been understood by a reasonable person or to choose between the possible meanings of words which are ambiguous. It may even provide insight into the sense of provisions in a lease where detailed semantic and syntactical analysis of words is going to lead to a conclusion that flouts business common sense.

The Qualifications of an Expert Witness

The Notes to the English Civil Procedure Rules describe an expert as:

“A person with a high degree of skill and knowledge in a particular subject, who has relevant and up to date expertise with regard to issues in the case, and sufficient education and communication skills to produce a clear written report and if necessary to provide helpful oral evidence to the court.”¹²

If the evidence of an expert is clearly reasonable, balanced, impartial and complete, a tribunal is likely to find it convincing. But concerns have been expressed about the failure of expert witnesses to give evidence that is independent, objective and unbiased.¹³ Tribunals will be wary of over dogmatic experts; those whose reputations are at stake; those who have developed a technical prejudice; and those whose opinions are adduced on a regular basis, so as to ensure that they have not allowed their views to be influenced (even unconsciously) by the prospect of receiving further instructions in the future.¹⁴ In many cases it is helpful to have conflicting views positively researched and presented by opposing experts. However this increases the risk of bias or at least advocacy within the expert opinion. If it is to be helpful an expert's opinion must be candid and impartial:

“An expert stakes his reputation on the assistance he gives a court, regardless of the fact that he or she is engaged by one of the parties...”¹⁵

Experts who are members of professional bodies such as the Royal Institution of Chartered Surveyors and the Irish Auctioneers and Valuers Institute are obliged to comply with their Practice Statements.¹⁶ The corresponding Guidance Notes and, although not directly applicable to the Tribunal, the Supreme Court Practice Direction on Expert Evidence¹⁷ both helpfully set out what is to be expected from expert witnesses.

HH Judge Hazel Marshall QC¹⁸ has pointed out that:

“When a tribunal “accepts” an expert's opinion, it is because the fact that he holds it, supported by his expert credentials, is itself a fact, and a fact which logically tends to suggest that what he states is likely to be correct.

This is worth emphasising. The relevant evidence is the fact that an expert holds the particular opinion. Once the combination of expert credentials (of at least some strength) and a particular opinion is proved, the existence of that opinion is a fact which is in itself a piece of evidence. Nothing more is required to make it admissible.

Like all evidence, its weight depends on its apparent cogency, and that can be tested and evaluated by looking at its circumstances.”

Although an expert's experience and standing will lend weight to the opinion, that does not mean that if he or she merely lists facts and baldly states a conclusion it will be accepted. The Tribunal expects experts to explain the linkage clearly - the reasoning and balancing that takes them from those facts to their conclusions - so that it can be examined and assessed. The ability to provide such an explanation is an essential qualification for an expert.

The same transparency in the expert's advice to the advocate, relating to the conclusions that an impartial tribunal might reach in light of all the evidence, should also help him or her either to predict the probable range of outcomes, or conclude that it is unpredictable and make appropriate recommendations. These matters are considered in Parts 2 and 3. ■

Part 2 will be published in the summer issue of The Property Valuer

REFERENCES

- 1 The Papers were written for and first published in *Folio* – a new Northern Ireland Conveyancing and Land Law Journal by SLS Legal Publications.
- 2 For further information go to the website at www.landtribunalni.org
- 3 The author will return to this issue in Parts 2 and 3.
- 4 *Per Carnwath LJ in Winter & Winter v Traditional & Contemporary Contracts Ltd (No 2)* [2007] EWCA Civ 1088
- 5 Article 54 Rates (NI) Order 1977
- 6 See *O'May v City of London Real Property* [1983] 2 AC 726; *McClellan v Scottish Provident* [1989] BT/80/1986; *Eason v Central Craigavon* [2003] BT/80/2001; and *National Co-op Chemists Ltd v Johnston* [2005] BT/69/2004
- 7 Francis Bennion *'Statutory Interpretation'* 4th ed
- 8 *Spruce v Palmer & Ors* [2004] R/63/2003
- 9 *Watt v NIHE* [2004] R/21/2002
- 10 Private arbitrations and therefore not published decisions.
- 11 See Lord Hoffmann's summary of the principles of interpretation of contracts in *Investors Compensation Scheme v West Bromwich Building Society*. [1998] 1 WLR 896
- 12 Notes to the CPR Part 35.2.1
- 13 *Without Prejudice* (EG 27 Mar 2004) and *Expert witnesses "losing reputation for impartiality"* (EG 28 Feb 2004)
- 14 *Phillips on Evidence 16th Ed 2005*
- 15 *Per Stock JA L v. C* [2007] 3 HKLRD and of course see also the summary by Cresswell J of the duties of experts in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, at 81-82.
- 16 Both under review at the time of writing
- 17 Go to NI Court Service website www.courtsni.gov.uk and follow links to Judicial Decisions then Practice Directions.
- 18 HH Judge Hazel Marshall QC Senior Chancery Judge, Central London Civil Justice Centre and Editor *Estates Gazette Law Reports* at Arbrix in 2007