

# An Expert Tribunal and Expert Opinion Evidence

## Part 2: Clear understanding between Expert and Advocate

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*This paper (part 2 of three) highlights the need for clear understanding between the expert and the advocate. The focus is on cases where the issue for the experts is a measure of value. Part 1 considered both the circumstances in which expert evidence may be helpful in the Lands Tribunal and the qualifications of an expert witness.<sup>1</sup> The papers are intended for all those involved in bringing a case before the Tribunal.*

### Clear understanding between the expert and the advocate

A lack of communication between the expert and the advocate will impede the proper preparation of a case and be a hazard to a just outcome, whether terms of settlement or a decision by the Tribunal. Clarity is essential at every step. Such communications are privileged<sup>2</sup> and entirely proper provided that the expert opinions given to the Tribunal are candid and remain the independent product of the expert witness.<sup>3</sup>

Before the Hearing, the Rules<sup>4</sup> of the Lands Tribunal provide a step-by-step approach to the presentation of a case. The first step is the production by the experts of reports setting out all the factual material, including expert facts, on which each intends to rely for their own opinions<sup>5</sup> along with an annotated valuation. These are exchanged so all the relevant facts, expert facts, as well as an outline of both experts' valuation are disclosed. The second step is the exchange of reports setting out the experts' opinions. Within their reports the experts should discuss the helpfulness of all the facts<sup>6</sup> put forward and explain why they have reached their particular conclusions. The next step is the examination of the evidence at an oral Hearing and usually the final step is post-hearing written submissions from advocates.<sup>7</sup>

Communications between the expert and the advocate may be considered in three categories:

- outlines or drafts from the expert setting out the substance of each report the expert intends to provide to the Tribunal;
- advice from the expert to the advocate to assist him or her to
  - assess the merits of the opposing opinions,
  - take appropriate steps to resolve the dispute and, failing that,
  - present the case to the Tribunal; and

- advice from the advocate to the expert to assist him or her to
  - reach conclusions that the law permits;
  - not stray outside his or her area of expertise; and
  - clarify his or her opinions.

The expert's outlines and advice may be given to the advocate informally, perhaps at consultations. There is a role for consultations but written explanations in plain language should be sought in advance. They will become part of the expert's opinion forming process, perhaps highlighting gaps in the material or causing a rethink on reflection and provide an opportunity for the expert to explore how best to communicate the reasoning and balancing. Bearing in mind that:

"an expert witness is a person with ... sufficient ... communication skills to produce a clear written report and if necessary to provide helpful oral evidence to the court"<sup>8</sup>

an expert who does not sufficiently communicate the reasoning and balancing that has led to the conclusion may be competent as an expert but may not be competent as an expert witness.<sup>9</sup>

Often in an expert's report the link between the primary facts and the opinion is not clear. The advocate should insist, from the start and at every stage, on being provided with a clear understanding of the expert's opinion on each issue and how it is supported. This may cause some initial resentment from experts - inexperienced expert witnesses may see it as doubting their professional competence but, with experience, they will come to value the opportunity to re-examine areas where the advocate suggests clarification is required and perhaps 'stress test' the links and communication skills before cross examination. The expert will

produce a better report and the advocate will reach a better understanding of the strength of the expert evidence.

A case may be weakened by blurring of the boundary between the roles of advocates and experts. Few of the valuation questions reaching the Tribunal are simply: "What's it worth?". Usually there are also issues about the interpretation and application of assumptions and disregards (contractual or statutory) that distance the value from the ordinary open market. For example, rent reviews and lease renewals may require the assumption of restrictions on user; some improvements to be disregarded (rents relied on for comparison purposes may or may not reflect such requirements); claims for compulsory purchase may require the effect of a scheme to be disregarded; rating appeals may require assumptions about the correctness of other assessments; or there may be a debate about the helpfulness of other arbitrators' or independent experts' determinations; or rents agreed after the valuation date. Expert valuers will have a background in the law relating to these matters and may have argued about them when acting as negotiators attempting to settle the particular dispute, or may have advised their client on interpretation and will find it difficult to resist the temptation to continue the argument. But if an expert witness acts as an advocate on an issue he or she will no longer be regarded as impartial and that will both diminish the weight that will be attached to his or her opinion on the issue and may detract from the credibility of the entirety of his or her evidence.<sup>10</sup>

If instead advocates invite experts to communicate these suggestions as advice *to them*, as the case progresses step-by-step, this will help advocates to maintain an informed view and experts to have confidence that the arguments will be properly presented to the Tribunal. In some cases the informed view may be that the expert is not an expert in some aspect of the dispute and cannot advise the Tribunal on the conclusion it should reach but he or she may still adduce expert facts that could assist it. In others it may result in an instruction that, as a matter of law the expert must adopt or not adopt a particular approach or that the client has decided not to pursue a particular issue of expert opinion. Where appropriate the expert should incorporate such instructions in the report to the Tribunal.

Valuation is a craft<sup>11</sup> not a science and the Tribunal will have no difficulty in receiving an opinion that states that the value lies in a range between x and y but in the expert's opinion closer to, say, y. The Tribunal also expects experts to reconsider their views and accepts that opinions may change, at any time, in the light of material received from the other expert or simply on reconsideration. Of course, if the change is substantial the advocate should promptly inform the other party. Experts may be expected to be examined in due course on why they have or have not changed their opinion but receptiveness to new evidence and willingness to make an informed change may add to credibility rather than detract from it.

The experts may and should meet. They may or may not have authority to settle some or all matters. But if they meet and agree on any matter, perhaps as opposed to agreeing on a compromise to a matter, the fact that the experts have agreed is something that must be disclosed to the Tribunal and, whether or not the clients would agree, that fact will be taken into account and is likely to be highly persuasive.

To aid understanding of the case the advocate may ask for guidance from the expert on a range of matters including:

- at the start,
  - the position and reasoning the expert for the other party adopted in negotiations and why his or her own should be preferred;
  - cases known to the expert that might provide a precedent;
- then, at each step as the case progresses, reasoned and balanced criticism of,
  - the written reports of the expert for the other party and why his or her own should be preferred; and
  - the oral evidence of the expert for the other party at the hearing (to assist both presentation of the case at the hearing and written submissions).

Some issues may be determined by the assembly and presentation of the relevant factual evidence. Others will be determined by consideration of the experts' logical reasoning. Many other questions, particularly those concerned with measurable matters such as rent may turn on an assessment of the competing views of the experts about the relative helpfulness of a range of evidence. But how can an expert's intra-cranial process of weighting be tested? How can it be brought out into the open, and examined? How can it be tested for sub-conscious bias? What is the Tribunal likely to make of it? The third part will suggest ways in which experts may better disclose their own judgment processes, analyse those of others and help the advocate make an informed prediction of a measured outcome. ■

## REFERENCES

- 1 See Property Valuer Spring issue 2009
- 2 *Harmony Shipping Co. v. Davis* [1979] 3 All ER 177
- 3 *Whitehouse v. Jordan* [1981] 1 WLR 246
- 4 Usually reinforced by Directions in the particular dispute
- 5 This is in contrast to many arbitration procedures where the experts are expected to produce a statement of agreed facts. That is a less focussed approach and can lead to the production of large volumes of unhelpful material.
- 6 Some facts, on which an expert may wish to rely, may require to be proven at a hearing. In circumstances in which there is controversial factual evidence that would be significant, the experts should include a valuation on alternative assumptions.
- 7 Rather than closing arguments on the day and giving time for mature reflection.
- 8 See the reference to Notes to the CPR Part 35.2.1 in Part 1. *Folio Issue* /
- 9 See *The Qualifications of an Expert Witness* in Part 1. *Folio Issue* /
- 10 See however the reference in Part 1. to the potential assistance of expert evidence, as such, in statutory and contractual interpretation.
- 11 Usually it is said to be an *art* but the author prefers *craft* with its connotation of learning from experience.