

Making Expert Witnesses' Reasoning Transparent

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Introduction

"An expert witness is a person with ... and sufficient education and communication skills to produce a clear written report and if necessary to provide helpful oral evidence to the court"

Notes to the CPR Part 35.2.1

Valuers who do not sufficiently communicate the reasoning and balancing that has led them to their opinions may be competent as experts but may not be competent as expert witnesses.

This article suggests a step by step approach by which valuers, who are inexperienced as expert witnesses, may sift through the material in a valuation dispute and prepare expert advice. The five steps are:

- Crystallising subsidiary issues;
- Distinguishing the effects of location and time;
- Measuring relevance and reliability;
- Crafting the draft report; and
- Balancing competing views.

These steps and associated techniques are intended to help experts develop transparent reasoning and balancing that will provide the bones of advice for both their own advocate and advice for a tribunal.

Crystallizing Subsidiary Issues

At any time after instruction it may be helpful for valuers to note some preliminary thoughts. As experts, they should trust their instincts and note instinctive reactions.

Although the ultimate issue in a case is usually clear, e.g. the rent, the subsidiary issues are more difficult to isolate and refine. As the material is assembled, valuers may crystallize the subsidiary issues by reviewing the preliminary thoughts and subsequent considerations. These issues may then be divided into those that are associated and those that are free standing. This requires insightful judgment and the creation of too many subsidiary issues will lead to confusion. These will be the building blocks that the surveyors will use to advise the tribunal

on the exercise of its judgment and, later possibly, provide a basis for an Award of Costs.

Mind mapping can be an effective method of managing, analysing and structuring notes in a complex case. After a series of revisions of the mind map, the subsidiary questions should become clearer, along with their links to the relevant opinion and factual evidence. The map may help to associate ideas and make connections that might not otherwise be apparent.

Such maps may be helpful in advising advocates, by highlighting where there are critical choices and questions of degree that could lead a tribunal to different conclusions.

Valuers may then develop the structural skeleton for their reasoning and reports by focussing on one subsidiary issue at a time and assembling, as notes or bullet points, everything relevant to that one issue only.

Distinguishing the effects of location and time

Two fundamental factors affecting rent are location and time. It is often instructive to view the evidence in a two-dimensional format – a table rather than a schedule (see Appendix 1). The horizontal axis may be divided into the largest time intervals that are consistent with illustrating patterns or trends. The vertical access may set out comparables in clusters at locations of different proximity to the subject.

The table provides a visual aid to distinguishing any pattern or trend of rents, may help to indicate rogue transactions and test the consistency or otherwise of analyses of difficult, perhaps unreliable, material. Such tables may be helpfully incorporated in expert reports.

Measuring relevance and reliability

Where a valuation issue is just a matter of judgment, a scoring framework and spreadsheet may help convert the effect of helpfulness into values and measure the effect of risk.

Suppose an expert says comparable A supports a rent for the subject of £65 and comparable B supports £50, adds that A is

twice as helpful as B, and says that the rent should be £57.50 (the average). That would be surprising because the additional weight attached to A should pull the answer towards it. A rent of £60 (a weighted average) would be more reasonable.

Suppose there is a third comparable C, in a similar location to B, that experts says supports a rent of £53 and, in terms of reliability, C is ten times as helpful as A or B. It is not immediately obvious how this new material should affect the answer.

A scoring framework and spreadsheet may help convert the effect of helpfulness into values. The framework and scoring system must be tailored to the case. (See Appendix 2)

A spreadsheet can set out a numerical measure of the weight to be attached to each and compute a weighted average. (See Appendix 3) The use of the spreadsheet compels an assessment of the relative helpfulness of comparables. The choice of relative weight is a matter of judgment. If notes, commenting on why each relative weight has been adopted, are recorded, they can form the basis for explaining the linkages between the comparables and the experts' relative weighting and balancing and their reasoning.

Scoring frameworks and spreadsheets do not replace expert judgment. But they encourage transparency of judgment by requiring a rigorous assessment of the relative helpfulness of comparables. Also they encourage careful assessment and re-assessment as they may be used to review the choice and effect of relative weights and relationships within and between clusters of comparables. Also, experienced experts may be surprised by the degree to which they suggest a conclusion that is close to their intuitive figure and the reassurance that provides.

As part of advice to advocates on likely outcomes that reflect all the material, and important matters to address in submissions, once reports have been exchanged, scoring frameworks and spreadsheets may be used to de-construct other experts' opinion evidence.

Crafting the draft report

When complete, the analysis of the material should provide the skeleton of a reasoned report. There is a great temptation to start too soon converting the notes, bullet points and tables into a draft. Often that is false progress as the drafting considerations distract the writer from the real issues. The improved structure developed through time spent on reviewing and refining the valuation approach will be rewarded by an easier translation into plain English.

At this point, good valuers take one step back. They should trust their instincts, if they suspect they have adopted an approach or arrived at a conclusion that does not seem to be correct, they should check again.

Before submission to a tribunal, expert reports should be provided to advocates in draft form. This allows advocates to ensure the report encompasses the case they intend to advance; assist experts to reach conclusions that the law permits; and suggest areas where experts might like to reconsider how better to communicate their reasoning and balancing.

Balancing competing views

When reports have been exchanged and surveyors differ about the helpfulness of a comparable, experts may adopt a technique for balancing competing views that is used by many experienced arbitrators. That is to divide a single page, for each comparable, into quadrants (see Appendix 4). In the upper quadrants they set out how the experts have analysed the rent and the adjustments they say should be made for differences between it and the subject. In the lower quadrants they set out brief notes of both the reasons experts have given for their analysis and their opinion of its helpfulness. A similar page may be prepared for the competing views of the experts on the subject property.

As the Tables will include almost all the material on which a tribunal will base its conclusions about the helpfulness of each comparable, it may assist the valuer to come to a view on whether a tribunal is likely to arrive at a decision flavoured by both opinions or will choose one, and which one is likely to prevail. On a 'what if' basis these may then be reflected in a scoring framework and balancing spreadsheet. This may form the basis for advice to advocates to assist them to assess the merits of the opposing opinions, take appropriate steps to resolve the dispute and, failing that, present the case to the Tribunal.

Conclusions

The experts' opinions given to a tribunal must be candid and independent and they must communicate the reasoning and balancing that has led them to their conclusions. These steps and associated techniques may help them achieve that.

They also may help experts to brief advocates at each stage of the proceedings and assist them to give clients earlier and better-informed advice. In the latter stages, the techniques may provide a basis for advice to advocates on the conclusions a tribunal is likely to reach, by clarifying the relative helpfulness of the opinion evidence and the primary facts on which it is based. A lack of communication between experts and advocates will impede the proper advancement of a case and be a hazard to a just outcome, whether that is terms of settlement or a decision by a tribunal. Such communications are privileged and entirely proper.

Computer applications may be of considerable assistance by encompassing a large amount of material on a virtual single page, dealing with changes as the case develops and testing 'what if' solutions. But none of the techniques should be taken too far and applied so literally as to be a substitute for skill, knowledge and expertise.

Finally, after a tribunal has given its decision, all these techniques may also be used to see whether its conclusions properly reflect its findings and reasons.

Appendix 1: Time and Space Table

Cluster	Occupier (Postal no.)	2004	2005	2006	2007
B	Jones (32)	£54			
B	Smith (36)	£59			
B	Bloggs (30)				£65
B	Granville (38)			£52	
C	Carson (50)		£32		
C	Eric (54)	£33			
A	Subject (27)				?
A	Don (29)	£36			
A	Fred (31)		£37		

The choice of scale will be a matter of trial and error. The author prefers a table with footnotes that remain associated with each comparable when it is moved to a new cluster but others may prefer a spreadsheet. ♦

Appendix 2: Scoring Framework

	Least relevant (1)	Quite relevant (2)	Most relevant (3)
Most reliable (3)		C	6
Quite reliable (2)		B	4 A 6
Least reliable (1)			

Appendix 3: Balancing Spreadsheet

Comparable	Rent supported	Scoring	Weighted Value
A	£65	6	390
B	£50	4	200
C	£53	6	318
		16	908
Adjusted	Rent		£56.75

Appendix 4: Quadrant Table

Comparable 3	19 High St
A says	B says
Ground floor ITZA 750 @ <u>£65</u> = £48,750 1 st floor 500 @ £3 = £1,500 Total rent = £50,250 Actual = £50,500	Ground floor ITZA 750 @ <u>£50</u> = £37,500 Add for return frontage (to side street) 15% = £5,625 1 st floor 500 @ £15 = £7,500 Total rent = £50,625 Actual = £50,500
Return frontage of no value because side street too secondary. 1 st floor little value because tenant fitted retail quality staircase and rent review terms required tenant's improvements to be disregarded. Rent review so not as helpful as comparables 1 & 2 which were open market lettings. Etc.	Return frontage of high value because signage and window display of tenant's display highly visible from along High St. Although tenants improvements to be disregarded, potential for improvements must be taken into account. More helpful than comparables 1 & 2 because closer in location and time. Etc.