THE EXPERT WITNESS, WHAT AN ARBITRATOR SHOULD EXPECT

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'This week's arbitrator is next week's expert witness, and vice versa' (or words to that effect), Christopher Willis, Arbrix Construction Group 1990.

Most surveyors will identify with Christopher Willis' remark. At various times the surveyor finds him or herself acting as either witness or arbitrator.

THE EXPERT WITNESS/ARBITRATOR RELATIONSHIP

Expert witnesses have been known to suggest that their contribution to the resolution of disputes is greater than that of the arbitrator. Their thesis is that almost all disputants need expert witnesses but (if the often quoted statistic is correct), only one in ten disputes reach a hearing and so require the arbitrator's full services. Indeed, if through their reports the experts are able to reduce the differences between the expectations of their respective clients, they may do much to obviate the need for a hearing which, as we will see later, represents a major part of the expert's cost and is a costly exercise in other respects.

The arbitrator has an ambivalent attitude to the expert witness. He relies on the evidence the witness supplies but he is always aware of the pressures to which the expert is subject and which might 'shade' the evidence.

WITNESS – ASSISTANT TO THE JUDGE

What is the role of the (expert) witness?

The Law Reform Committee in its 17th report in 1970 concentrated on the subject of 'Evidence of Opinion and Expert Evidence'. Some recommendations of the committee were incorporated in the Civil Evidence Act 1972 (Reynolds and King, 1988, p. 15).

Essentially, as the following extract from the Law Reform Committee's report demonstrates, the witness's task is to assist the judge (or arbitrator) with his tasks. The report reads:

> 'If in either of these (the judge's) tasks it will assist the judge to be informed of the opinion of some other person or any matter upon which he has to make up his own mind, evidence of that person's opinion should, in principle be admissible. The test should be: has the witness who expresses his opinion some relevant knowledge not shared by the judge which makes the opinion of that witness more likely to be right than the opinion of someone who does not possess that knowledge?'

THE JUDGE'S/ARBITRATOR'S TASKS

What are the judge's tasks, referred to above? Clearly if the expert witness is to assist the judge or arbitrator with his tasks he should know what they are. The Committee report summarises:

> 'In any Civil litigation the first task of the judge is to ascertain for the evidence put before him by the parties, what events have happened in the past and it may be, what other events are likely to happen in the future. His second task is to form his own opinion as to whether these events are of such a character as would entitle the party complaining of them to a particular legal remedy against another party to the litigation. But this second task often involves his forming an opinion as to whether or not a person's conduct in relation to those events conformed to the standard of skill or care or candour to be expected of someone doing what that person did in the circumstances in which he did it.'

THE EXPERT'S ROLE AND TASKS

The primary task of 'our' expert witness is, then, to share his 'relevant knowledge' with the arbitrator so that the arbitrator might decide that our expert's opinion is more likely to be right than the opinion of some other expert.

How does the expert share his knowledge? What is the expert's role?

Several authorities have described the functions and role of the expert.

The 1970 Law Reform Committee discusses various ways in which experts provide information to the judge. Reference is made to expert assessors sitting with him to give him advice and to the appointment of an expert to make a report to the court and to the parties. The committee concludes, however, that the way usually adopted is for the judge to be supplied with the relevant information by expert witnesses selected by the parties and subjected to the usual procedure of examination-in-chief, cross-examination and re-examination.

With regard to the expert's function, the Committee recognises that the expert's task commenced well before his appearance at the hearing:

> 'the function of the expert in litigation is not limited to giving evidence. He will help solicitors and counsel on his speciality, warn them of pitfalls, make suggestions as to cross-examination of witnesses, factual as well as expert. None of this, as distinct from the substance of the evidence which he himself proposes to give in chief at the trial, if he is called, need be disclosed.'

Ronald Bernstein, QC, 1987, 16.2, goes further. He identifies in more detail the separate but complementary tasks of the expert and he touches on the expert's dilemma:

> 'While a case is being prepared, the expert owes a duty to his client to assist by every proper means in the preparation of the case and if so requested, in negotiation. But once the witness begins evidence (and this includes submitting a proof before the hearing, as well as the oral evidence given during the hearing) his duty to his client is no more than that he shall use a reasonable level of professional skill and care. Subject to that duty he owes a duty to himself to tell the truth, and to the arbitrator to assist the arbitrator at arriving at a just decision. No greater tribute can be paid to a professional man than to have it said of him that his evidence will be the same whoever is paying for it.'

Bernstein's interpretation is more uncompromising than a view expressed by architect and arbitrator Francis Goodall writing in *Arbitration*, August 1990 under the title 'The expert witness: partisan with a conscience'. Goodall suggests; 'In a report for exchange the expert is entitled to leave unsaid such of his opinions and conclusions as are disadvantageous to his client. That is not to resist telling "the whole truth". The opinion of an expert, be he never so eminent, is not "the truth" even through it is truly his opinion; so he may keep it to himself if he thinks fit, until such time as someone may question him about it directly.'

On the other hand, Goodall remarks that on a handful of occasions he has found it necessary to inform a client that he, Goodall, did not consider he could help because the client's case was not strong enough.

There are some nice differences of interpretation between Goodall and RICS past president, John Watson, referred to by Bernstein as 'a writer of great experience in determining valuation disputes'. Watson says that; 'an expert witness is subject to the same basic rules as a lay witness... but because of his professional training and experience he is permitted... to include in his evidence the opinions he has formed and the conclusions he has drawn. The solemn undertaking that his evidence shall he "the truth, the whole truth and nothing but the truth" must be observed as strictly by an expert witness as by a lay witness. If he is a valuer, it is probable that there were negotiations before the parties decided to litigate; that they took the form of bargaining by the experts; that the experts legitimately inflated and deflated the figures which they proposed as a basis for settlement in the hope of achieving a fair compromise. But once an expert has entered the witness box his status has changed. No longer is he a negotiator, but a witness on his oath... there remains only one standard of truth.' Watson, 1975, p. 3.

Watson makes the dilemma of the expert plain for all to see. At some point in time the expert is transformed into the witness. His allegiance is transferred from his client to the arbitrator whose assistant he must now be.

Goodall suggests there are three phases in the expert's works which he, rather neatly, refers to as: client's candid friend, hired gun and witness (*Arbitration,* August 1990).

The dilemma is, then, that our witness is employed and paid by one party to a dispute, he commences as consultant and probably becomes negotiator. If he is doing his client justice he will be partisan, the hired gun. He must, however, change his spots when he commences his report and while he is 'in court' and

remember that he is the arbitrator's assistant even though it is his client who is paying for his appearance at the hearing!

OLYMPIAN DETACHMENT

In an article in *The Times*, 12 July 1990, J.R. Spencer referred to the difficulties experienced by the expert appointed by the disputants which are pertinent to this paper, he wrote:

> 'A reputable scientific witness tries to adopt a neutral stance when giving evidence, but it is no easy matter for him to avoid identification with the party that employs him. And even if the expert manages to achieve Olympian detachment, his neutrality is likely to be undermined by the working of the adversarial system.'

There can be little doubt that Olympian heights are not always achieved. Commenting on the manner in which expert evidence was given Mr Justice Garland (*D&F Estates Ltd v Church Commissioners*, 1988), regretted that experts often advocate their client's case, suggested that experts with opposing views should deal with them in their reports by providing explanations and that experts who changed their views or developed new theories at a late stage should inform the other side in writing as soon as possible after the change.

The arbitrator is entitled to expect the good expert witness to do his best to live with The Gods. He is entitled to expect that the expert witness will act professionally despite commercial pressures and despite pressures for expediency from other members of his client's team. The arbitrator, from his time spent as expert, will be aware that a regular client is a powerful incentive for the expert to 'distort the balance of the evidence' that he is advancing but he, the expert, must retain his detachment.

THE REALITY

In a succinct and almost light-hearted comparison of what he, as an arbitrator, wants from a hearing with what he actually gets, Leslie Alexander includes as one subject for comparison, Experts' Evidence (*Arbitration*, May 1987). There are four items:

What he wants of the expert witness:	**What he gets:**
Clear reports are usually obtained from good experts and should be exchanged before the hearing so that differences are highlighted and areas of agreement identified.	Reports are inadequately or not agreed at all before the hearing.
In evidence in chief reference to agreed matters need only be made in laying foundation for other questions.	The expert is taken in detail through his entire report with almost identical emphasis being placed on matters which are agreed and matters in dispute

Similarly cross-examination should concentrate on the areas of disagreement.	Cross-examination is far reaching, with the expert being required to justify his every conclusion or statement in the hope that his answers will give the opportunity for attacking his credibility.
Re-examination should hardly be necessary if the witness has performed well in cross-examination. If he hasn't done so, re-examination may not be enough to counter his poor performance.	Re-examination is again detailed and protracted and very largely repetitious

ACCEPTING SUGGESTIONS FROM LAWYERS

During preliminary meetings with counsel and expert will, as discussed above, be expected to advise his client's counsel and solicitors and do his best for his client. Inevitably, the 'best case' for the client will be discussed and it is likely that solicitor and counsel may suggest ways in which the expert's evidence is 'shaded' to the client's advantage.

Bernstein, 1987, 16.5, commenting on suggestions by lawyers says the witness may or may not accept them but:

> 'if, at the core of cross-examination he is reduced to saying, well, this idea was really counsel's, and on reflection I don't think it was a good idea, then his evidence is thoroughly and perhaps fatally discredited.'

Bernstein's view is shared with Lord Wilberforce *(Whitehouse v Jordan,* 1981) who said:

> 'It is necessary that expert evidence presented to the courts should be and should be seen to be the independent product of the expert, uninfluenced as to form and content by the exigencies of litigation. To the extent that it is not, the evidence is likely not only to be incorrect but self-defeating.'

It is interesting that both Bernstein and his Lordship comment not only on the possible ethical failure of the witness but on the likelihood of the evidence failing to convince the judge/arbitrator. Ethics and commerce find common ground! Satisfying God and Mammon?

SKILL OF THE EXPERT

What level of skill should the arbitrator expect from the witness?

In addition to the House of Lords decision (*White-house v Jordan,* 1981) to the effect that the test is that of the man on the top of the Clapham omnibus, the standard of special skill applicable to the expert witness was considered by Mr Justice Megarry (*Duchess of Argyll v Beulselinck,* 1972); "if the client engages an expert and doubtless expects to pay commensurate fees, is he not entitled to expect something more than the standard of a reasonably competent expert?"

The case is concerned with specialist solicitors' skills and I recognise that solicitors are not surveyors but there are parallels between the tasks of the solicitor and the surveyor when acting as expert witness and I believe others are of the opinion that Mr Justice Megarry's ruling would apply to a surveyor.

I suggest the arbitrator is entitled to expect the expert witness to demonstrate a special duty of care. (Unless the witness is undercharging for his evidence? What is a commensurate fee?)

USE OF REFERENCE WORKS

It is an exceptional expert who has personal experience of all aspects of all subjects on which he may be required to opine.

To what extent may he refer to articles, etc?

Bernstein's view is clear (Bernstein, 1987, 37.3):

> 'An expert may refer to views expressed in a textbook or article in support of his opinion. The weight attached to an expert view which is dependent largely upon such material would normally be less than the weight attached to an opinion founded upon personal experience.'

SHADES OF CONFLICTING EVIDENCE

A problem which most arbitrators experience is deciding on the weight of conflicting evidence.

What might the arbitrator expect the experts to do to assist him with his task?

Speaking at a joint meeting of the Chartered Institute of Arbitrators and the British Academy of Experts in 1991, Bernstein, 1991, puts conflict in evidence in four classes:

Class A: There is a genuine difference of opinion between experts;
Class B: The experts have arrived at different conclusions because they have proceeded from different factual premises;
Class C: One or both experts have become subconsciously partisan, and,
Class D: One or both experts have become deliberately partisan.

Bernstein suggests that Class A conflicts (genuine differences of opinion), are better decided by a technical arbitrator than a judge alone. In such cases the experts' reports are available for the arbitrators consideration.

Clearly, the arbitrator would expect the experts' reports to provide him with all he need ask but Bernstein says that only one case in ten that comes before the arbitrator falls in Class A.

Class B conflicts (where the experts have arrived at different conclusions because they began from different facts), should not reach a hearing because the experts should have met before the hearing to agree facts ad narrow issues.

The arbitrator has reasonable expectations that the experts would expedite resolution of the dispute in this way. This is the situation envisaged earlier when discussing the relationship of witness and arbitrator.

Class C conflicts (where one of the experts has become subconsciously partisan) account, says Bernstein, for eighty to ninety percent of the cases in which he has been concerned. I referred to one reason for partisanship, earlier. An expert who not infrequently receives instructions from a solicitor will inevitably develop a rapport with him which may make objectivity and impartiality difficult. It is interesting that Bernstein puts the incidence of subconscious corruption as high as eighty to ninety percent but nevertheless, the arbitrator is entitled to expect the expert to tell the truth, the whole truth... at the hearing.

Class D conflicts (where one or both experts have become deliberately partisan) are those which in some respects present the witness with his greatest challenge. Bernstein is unequivocal; the partisan expert is either liar or perjurer, depending on the status of his evidence. He suggests that it is more difficult for the judge to detect the partisan witness than the perjurer at report stage but that if the dispute goes to the hearing the chances of the report being detected are great. It is the client who will suffer most if the report fails at the hearing when cost are at their highest.

Caveat arbitrator!

THE HIGH COST OF EXPERT OPINION

Researching for and preparing a report is a time consuming activity and the product will, necessarily, be costly. That said, clients expect value for money and it is a prudent expert who seeks ways of keeping the cost of his services as reasonable as possible.

To that end, quantity surveyor Michael Needham undertook analyses of the costs charged by expert witnesses in four construction arbitrations for which he was arbitrator. Only one expert was called by each side.

In a challenging paper (*Arbitration*, February 1988) he identified ten 'cost centres' covering stages from taking instructions and providing a preliminary view (6%of cost) to attendance upon the hearing, the highest, at 46%, the second highest cost being preparation of a preliminary or provisional report at 21%. The average expert cost per arbitration was £35,000 and the average amount in dispute was a little under £250,000.

Needham's thesis is that if one identifies where the money goes one knows where to concentrate cost saving energy. He maintains in his paper that it is frequently possible to save as much as 80% of the cost of preparation of the respondent's experts' reports.

The initiative for innovative procedures to reduce costs of experts' evidence is more likely to come from the arbitrator than from the expert but the arbitrator is, I suggest, entitled to expect the expert to co-operate with him in keeping the cost of arbitration as low as possible. We have ample evidence in recent years of clients seeking alternative methods for resolving their disputes when the time and cost of traditional methods appear excessive.

SUMMARY

The arbitrator's expectations of the expert witness is a wide subject. I have attempted to look in breadth rather than depth, airing the view of as many of those involved as possible. Inevitably, by relaying a variety of views there is some repetition.

Only the briefest mention has been made of the part played by meetings of experts, etc., because these may occur before the arbitrator is appointed. In such circumstances the arbitrator will be in no position to have expectations of the expert witness.

The more one studies the subject the more one becomes aware of the difficulties facing the expert in making the transition from expert consultant to expert witness. This is his primary professional difficulty. He has a professional responsibility to his client to safeguard his interests and obtain the best commercial result for him but he also has a duty to the court.

In many respects the arbitrator's difficulty is as great as that of the expert but different. The Court of Appeal (*Fox v PG Welfair Ltd)* 6 May 1981 with Lords Denning, Dunn and O'Connor and Mr Justice Ackner ruled that arbitrators on building contracts must decide on evidence presented, not on their own knowledge. Clearly, the Court puts responsibility with the arbitrator to determine whose evidence is the most convincing. The arbitrator is entitled to expect that the expert witnesses will assist him with his decision-making in the various ways discussed in this paper.

And next week, when he is witness, he must live up to the arbitrator's expectations.

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