

## **EXPERTS – WHOSE ARE THEY?**

We all engage an expert at some time in our lives e.g. a solicitor, an accountant, a doctor. Those in the property industry encounter experts all of the time such as surveyors, engineers and architects. Often when a dispute arises, an appropriately qualified expert is required to explain (to a court, if necessary) why something has gone wrong, what should be done about it or what the costs of putting it right might be.

Parties to a dispute frequently engage an expert with whom they already have dealings; a landlord might use its retained surveyor to act in a lease renewal case. When we employ a professional, we expect them to have our interests at the forefront of their mind. We want that person to be on our side fighting our corner. We consider that the expert's obligations lie to us alone.

However, if the expert has to give evidence before a tribunal (whether it be a court, an arbitration, an expert's determination etc.), the expert also has duties to that tribunal and they override the duty to a client. Those duties include the presentation of independent evidence (for which the expert is appropriately qualified) and assistance to the court by way of unbiased opinion, stating the facts on which the expert relies and showing consideration of facts that may detract from the expert's opinion. Those duties can be in conflict with the expert's duties to the client who engaged him or her.

### **Conflicts**

Such conflicts often cause dissatisfaction in the mind of the client, who might put pressure on the expert to present a view that is more favourable to them than it objectively ought to be. The experienced expert will and should resist such pressure.

Modern civil litigation is conducted under procedures known as the Civil Procedure Rules (CPR). The CPR set out the approach a court will adopt when considering whether a dispute warrants the use of experts and also sets out guidance about how the expert should approach its role.

Surveyors are also required to comply with the Royal Institution of Chartered Surveyors' Practice Statement and Guidance Note for Surveyors Acting as Expert Witnesses (Second Edition, 2000). This requires, among other things, the surveyor to be truthful as to fact, honest and correct as to opinion and complete as to coverage of relevant matters. It requires the surveyor not to be biased towards the person responsible for instructing or paying the surveyor.

### **Sometimes things go wrong...**

The expert may have expressed opinions on which those instructing them have relied, possibly incurring substantial litigation costs as a result. It may turn out either that the opinion was wrong or that the expert has changed his or her mind (perhaps as a result of views properly put by an expert for the opponent). Is the expert exposed to claims by those instructing him or her for, say, negligence? It would appear not.

Experts as witnesses in legal proceedings have immunity from negligence claims in relation to the giving of evidence to the tribunal and the work principally and proximately leading to it, including the preparation of reports and joint statements which are adopted as evidence. Although the expert may be protected from a suit by the person instructing him or her, the actions of the expert may have led others to suffer loss.

This problem arose in the recent case of Symes & others v Phillips & others (High Court, 20<sup>th</sup> October 2004). The claimants (who had succeeded on an issue in respect of which an expert had given evidence) argued that the expert should pay compensation (in wasted costs) to them because they had suffered loss by reason of what they said was gross dereliction of his duties as an expert. While it is not known whether or not the court concluded that the expert had indeed acted in breach of his duties, it did

conclude that there was a case to answer in that respect. It was found to be legally possible for an expert to be required to pay costs wasted if the expert did so in flagrant disregard of his duties to the court. Whether or not this expert should in fact pay wasted costs was to be decided at a later date.

This should act as a clear warning to experts to be mindful of the duties of an expert and to make sure that the client is fully aware of that right from the outset. For this reason, sometimes it may be better for a client to agree that a different professional to the person retained by the client should be instructed as an expert. This improves the chances that the expert will be seen to be impartial and will be more likely to express his or her own views rather than those of the client.

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