THE PRACTICALITIES OF THE PRESENTATION AND CHALLENGE OF EXPERT EVIDENCE

By

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"…Persons of peculiar skills…"

Pigott CB

"This trial lasted 58 days: 6 days for submissions and the rest for testimony; expert evidence being the vast majority of it. Another case on pyrite heave ran before the Commercial Court for 159 days and then settled. Counsel proofed this case very carefully. They cannot be faulted, but must rather be praised. Calling several experts on the one topic, however, may be an issue that will require the trial judge to be involved in directing appropriate proofs, a step beyond case management, if delay and expense are not to be allowed to potentially defeat the right of access to the court guaranteed in Bunreacht na hEireann."[1]

Charleton J

Introduction:

Sir Norman Birkett KC appeared for the prosecution in the trial of Alfred Arthur Rouse accused of the murder of an unknown passenger in his car in November 1930 by setting the car on fire. Rouse claimed that the fire was accidental. The defence called an expert witness who said that he was an engineer and fire assessor who gave definitive evidence that the fire was caused by a loose fuel line. Birkett opened his cross examination as follows:

"Q: What is the coefficient of brass?

A: I beg your pardon?

Q: Did you not catch the question?

[1] James Elliott Construction Limited v. Irish Asphalt Limited [2011] IEHC 1

A: I did not quite hear you?

Q: What is the coefficient of the expansion of brass?

A: I am afraid that I cannot answer the question off hand.

Q: What is it? If you do not know, say so. What is the co-efficient of brass? What do I mean by the term?

A: You want to know what is the expansion of the metal under heat?

Q: I asked you what is the co-efficient of the expansion of brass? Do you know what it means?

A: Put it that way I do not.

Q: You are an engineer?

A: I dare say I am.

Q: Let me understand what you are. You are not a doctor?

A: No.

Q: Not a crime investigator?

A: No.

Q: Nor an amateur detective?

A: No.

Q: But an engineer?

A: Yes.

Q: What is the co-efficient of the expansion of brass? You do not know?

A: No; not put that way."[2]

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[2] With thanks to Jonathan Gaunt QC, presentation given by Falcon Chambers in the UK in 2005. As related by Mr. Gaunt the conclusion of the story following on from the abuse inflicted on the poor the expert; "Rouse was found guilty of murder. The appeal failed. Rouse was hanged at Bedford goal on 10th March 1931."

The tone and approach of adopted by Sir Norman might not be considered a subtle - or even a remotely fair - engagement by Counsel with an expert witness. The "Birkett" form of cross aims to dominate, hector and bully the witness while, simultaneously, attempts to diminish him in the mind of the tribunal. As such, it might be seen as outmoded. Tribunals now expect the cross examination of an expert witness to be a more even affair; although, whenever presentation and challenge of expert evidence occurs the process cannot be wholly absent of drama (often at the expense of the hubristic cross-examiner).

The fulcrum of the success or failure in construction disputes is often the quality of the expert opinion evidence provided by the parties to corral sprawling fact and proffer expert opinion evidence to guide the relevant tribunal in forming its judgment on the matters in controversy.

The proper role and the treatment of expert evidence bedevils the practice of law and the administration of justice; lessons acquired in other fields may be usefully applied in construction dispute setting.

Baroness Helena Kennedy QC's Report on "*Sudden Unexpected Death in Infancy*" by a Royal College of Pathologists and the Royal College of Paediatrics and Child Health working group[3] is such an example where the working group concluded that:

- the duty of experts giving expert evidence is to ensure that the foundation of that evidence is sound;
- experts are often drawn into error because they base their evidence on belief as opposed to a rational and explicitly stated analysis;

[3] http://www.rcpath.org/NR/rdonlyres/30213EB6-451B-4830-A7FD-4EEFF0420260/0/SUDIreportforweb.pdf

- there is temptation, particularly in an adversarial arena for an expert to allow him or herself to be pushed unadvisedly into the profession of certainties where such certainty without disclosed *caveat* may be inappropriate;

Experts should constantly remind themselves that they are independent and not there to win the case for a side. The roles of an advocate and expert witness are starkly incompatible. The witness must endeavour to preserve his impartiality and the appearance of his impartiality "*which the advocate neither pretends nor practices*".[4]

For several reasons inherent in the role, experts can sometimes find it difficult to maintain their dispassionate distance and, indeed, experts often stray into becoming "*hawkish*" in particularly when pressed by skilful cross examination. The expert can also sometimes fail to appreciate the difference between the role and expectations of his or her professional life (e.g. the advocacy inherent in the performance of their roles as *a* construction professional in practice such as an architect or structural engineer) and the contrary expectations placed upon him or her as an expert witness.

The function of the expert witness is to assist the tribunal of fact in arriving at its own conclusion on the technical matters at issue in the case. The views of an expert are not binding on the relevant tribunal and where a controversy arises as to the evidence to be preferred the tribunal has a duty to form a view on which elements of the expert evidence it prefers.[5]

As a practical aside, it is remarkably prevalent that many (ostensible) controversies between experts in litigation turn out not to be so intractable. Often they have their genesis in initial assumptions, the terms of the relevant experts' instructions or - simpler even still – merely different ways of expressing the same conclusion. This is worth bearing in mind in our

[4] Jonathan Gaunt QC op. cit.
[5] As discussed by Charlton J. in **James Elliott Construction Limited v. Irish Asphalt Limited** [2011] IEHC 1: "The role of an expert is to elaborate on the principles applicable to an esoteric discipline and to indicate why, as a matter of good sense and as a matter of opinion, a finding of fact ought to be made in one way rather than the other."

discussion of expert preparation, the presentation of expert evidence and the (daunting prospect) of the challenge of expert evidence in cross examination.

An expert is a person who by reason of special qualification or experience having satisfied the Tribunal or his/her standing is entitled to express an opinion for the guidance of the tribunal of fact.

In compliance with the general rule that opinion evidence is inadmissible, the first *'port of call'* in the Tribunal's analysis is to consider whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is allowed (this inquiry is often implicit).

The second arm of the tribunal's inquiry is whether the expert witness has acquired by study or experience sufficient knowledge of the subject to make his or her opinion of value in resolving the issues before the Court (again, this process is rarely controversial).

However, in construction cases, which commonly turn on the tribunal's evaluation of expert opinion (not to mentioned the expert's collation of the relevant facts from the factual matrix), the tribunal should satisfy itself (if necessary) that new or unfamiliar technology, techniques or theories have sufficient scientific basis. Per Lord Styen

> "*It would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and …advances in science."*[6]

Human knowledge is in a constant state of advancement; it would be unjust not to allow evidence because it is new and challenges old certainties. However, the tribunal should ascertain that any such "new developments" are adequately grounded in science and a proper body of research. In addition, the tribunal - through counsel or otherwise - should establish:

1. The credentials of the expert;
2. The expert's area of professional practice and expertise;

[6] Clarke [1995] 2 Cr App R 425, 430

3. Whether the expert is currently engaged in professional practice;
4. Whether the professional expert is in good standing with his or her own professional body;
5. Whether the professional expert is up-to-date with his or her continuing professional development obligations;
6. The extent to which his or her views are widely held by members of his or her profession.

From a more practical point of view, an expert commissioned in a construction dispute would be expected;

1. To stand over his/her opinion and demonstrate the logical analytical basis underpinning same;
2. To rebut other views, usually advanced by opposing experts in the relevant field;
3. To assist the tribunal by explicitly distinguishing between matters which may be stated with some degree of scientific certainty and those aspects of his or her evidence that are premised on his or her expert judgment;
4. To critically consider opposing expert opinion and to opine the extent to which such opposing views have merit and to identify / expose their vulnerabilities in evidence.

The Process of Commissioning Expert Evidence:

In most things preparation tends to forestall disaster…

Expert evidence is one of the first issues to be considered by a dispute resolution team (client, advising expert(s), solicitor and counsel).

The overarching strategy to be applied to expert evidence is usually addressed in some detail in the Advice of Proofs completed by the senior advocate leading the case. The Advice on Proofs will also delineate the legal issues in the case and, subsequently, the propositions which need to be established by expert evidence or that need to be opposed by expert evidence.

Experts to Advise the Proceedings v Expert Witnesses to be called to give evidence

Experts are often retained to advise the dispute resolution team in preparation for the case. Particularly in higher value contests, it is tactically astute to distinguish and separate the roles of the expert providing advice to the litigation team ("litigation adviser") and expert witness.

The expert witness should be maintained at a certain distance from the core litigation or arbitration team while the litigation adviser, imbedded in the team, may advise upon the conduct of the proceedings (n.b. the litigation adviser may well be offered as a witnesses as to **fact** at hearing).

One should always be mindful that an expert called to give evidence can be cross examined on any issue relevant to the case. If a key expert is adroitly painted by skilful cross examination as subject to bias and lacking independence this can cause manifest injury to the prospects of the case.

In construction dispute resolution, expert input should be sourced at an early stage of the case preparation. At this early juncture, the litigation adviser is most useful in painting the factual matrix in relief; identifying which facts are key to the claim(s) to be advanced or to be defended and those facts that are more tangential in nature to the fundamental issues in controversy between the parties. The litigation adviser can also be very helpful in the process of identifying and retaining an appropriate expert witness. As the case preparation continues, the advising expert can also be usefully deployed to act as "devil's advocate" to stress test the foundation of analysis and resultant opinions of an expert witness.

As noted above, the litigation adviser may often have to be called to give evidence as to fact (as to the design process, the building process, delay, etc). Consideration in these circumstances should be given to what evidence should be further explained or expanded upon by the expert witness at hearing.

Choosing the Expert Witness

The legal team, having precisely identified the legal issues in the Advice on Proofs, should formulate a preliminary "long list" of potentially suitable candidates who are recognised experts in the relevant field.

In deciding upon the expert witness to be retained previous trial experience is a significant advantage. In addition, one might consider looking for formal expert witness training. A member of the dispute resolution team (in larger cases, usually a junior solicitor working in tandem with junior counsel as necessary) should be charged with conducting online investigations to determine any areas of weakness such as unfavourable judicial comment, professional controversy, etc.

Upon consideration of this report a "short-list" of experts should be drawn up. Those potential experts remaining on the short list should then be contacted and asked to provide professional biographies / curriculum vitae setting down their relevant experience and published literature which should again be the subject of further investigation.

The process might then move to direct discussions (after a further whittling down of the list) where the knowledge, experience, expertise, qualifications and professional training of the potential expert(s) might be discussed in addition to his or her resources and availability to commit to the process. These discussions should also cover relevant timescales of the proceedings, the standard required from the expert and the likely timeline for the production of the report.

It is a personal view but professional experts who are still in practice in their profession might be preferred. The *gravitas* of seniority is an attractive characteristic to have in an expert witness.[7] However, if the expert has seen and dealt with a similar construction issue in professional practice with substantially similar facts to the matters in the dispute this practical knowledge can be very persuasive in evidence. The use of relevant "comparators" is one of the

[7] "But what of Cicero? shall we sound him? ... O, let us have him, for his silver hairs. Will purchase us a good opinion." Julius Ceasar, Act II, Scene I

most effective techniques in giving compelling expert evidence. Obviously, a combination of both might be considered the ideal.

The proposed expert might also be asked to identify any aspect of the proposed instruction / commission which may be unfamiliar or beyond his or her specific professional expertise.

The proposed expert might be asked to clarify whether he or she would propose involving another party in the performance of his commission and to identify what work that the additional party/parties might undertake and to provide their names and the details of their experience and qualifications (e.g. laboratories for the testing of construction materials such as concrete, aggregate, etc.).

As with any engagement, the terms of business should be clarified at an early stage in the process (e.g. the cost of expert evidence has an innate habit of growing exponentially unless made the subject of constant careful control by the instructing solicitor). The instructing solicitor and the proposed expert should discuss and agree remuneration (either on an hourly or daily basis or, more unusually, a set fee for the project or services to be provided).[8] Other terms of business to include the treatment of travel time, reasonable expenses, fees for attendance (and, perhaps, fee arrangements in case of cancellation of hearing dates) should be discussed and agreed.

Pursuant to the offer and acceptance of the commission, the expert should be provided with full and detailed instructions informed by the Advice on Proofs. The instructions should be

[8] It should go without saying that contingency fee arrangements are not appropriate. Please see paragraph 4.31 page 204 of the Law Reform Commission's Consultative Paper on Expert Evidence where the author states: "In the context of payment of experts, the existence of a contingency fee basis for payment is potentially indicative of a pecuniary bias on the part of the expert during the trial process. In England, the appropriateness of contingency fees was considered in **R (Factortame) v Secretary of State for Transport** [2002] EWCA 932 where the court held that such arrangements would not automatically preclude evidence, but such an interest should be disclosed and may affect the weight of the evidence."

drafted carefully to focus his or her work in the preparation of the requested opinion on the core legal issues in controversy.

Such instructions should also include the necessary prosaic information to include basic information such as names, addresses, telephone numbers, dates of birth and relevant dates from the factual matrix of the case; the type of expertise and sub-specialities sought; the purpose of the retention; the purpose of the report sought; a full and detailed description of the matter(s) to be investigated; questions to be addressed; provision of a history of the matter (specifically highlighting contested facts that are in dispute between the parties); details of relevant documents; the state of the proceedings, the identity of the parties in dispute and details of necessary attendances for case-preparation conferences, pre-trial meeting of experts and on relevant hearing dates; the issue of privilege to include brief advices in relation to inadvertent waiver;

The same instructions might also usefully include a brief synopsis of the role and duties of an expert witness in litigation or arbitration.[9]

Conscious and Unconscious Bias

As part of the process of identifying and choosing an appropriate expert witness, the litigation team should consider the issue of bias.[10] The Law Reform Commission Consultation Paper of December 2008 ('the LRC') delineates bias under the following headings:

Conscious bias ("The Hired Gun"): The LRC describes conscious or deliberate bias as the problem of the partisan expert, or the "hired gun", where the expert fails to appreciate the extent of the role and the overriding duty owed to the tribunal to assist the Court in arriving at the truth by providing a skilled expert assessment which is objective and fair, but is biased in favour of the

[9] The Law Society of Scotland have produced a useful checklist of issues entitled "Code Of Practice: Expert Witnesses Engaged By Solicitors" which reproduced at Appendix A hereto.
[10] Please also have regard to an excellent article by Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 CJQ 425 which explores the issue of bias summarised herein in more detail.

instructing party due to the fact that the party is paying them, or in some cases, due to the expert's personal feelings on issues involved in the case.[11]

Personal interest bias: This is where the expert is influenced by his or her on their own beliefs or moral viewpoints on certain issues[12] or where he or she has formed preconceived opinions due to personal relationships, or due to an affiliation with or membership of the same organisation as one of the parties to the proceedings, or due to emotional involvement, due to what is known as "*case hardening*"[13].

Also under this heading is the potential allegiance an expert may have to his or her particular profession, making them more disposed '*to pulling their punches*' in evidence or (consciously or unconsciously) shielding the reputation of a colleague from the attack. This form of bias is of particular relevance in construction cases in a small jurisdiction such as Ireland where the Plaintiff seeks to assign blame for loss on the construction professionals involved in the build/project. The particular framing of the issues often results in dramatically conflicting expert evidence where, without "*wilfully meaning to be partisan*"[14], an expert witness may be more comfortable in giving evidence on behalf of the defendant professional. This can often require the instruction of a foreign expert.

As part of the bias analysis, a competent counsel should be mindful of the risk of their own expert witness unexpectedly weakening or softening on cross examination by reason of discomfort in criticising a colleague.

Other forms of more straightforward bias can include financial interest in the outcome of the case, pecuniary interest in one of the parties, a desire to curry favour with an instructing client (or solicitor) leading the expert to present the case "*in the best light possible*".

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[11] Law Reform Commission - Consultation Paper Expert Evidence; December 2008 at pages 197 et seq.
[12] The LRC in op. cit. gives an example of this form of bias in a US case of **Hertzler v Hertzler** (1995) WY 206; 908 P. 2d 946 where the expert appointed by one of the parties admitted under cross-examination that his religious beliefs regarding homosexuality affected his opinions in the case.
[13] See **Vernon v Bosley** [1996] EWCA Civ 1217 where Thorpe J found the claimant's expert witness's evidence to be "thoroughly partisan reports". He explained that "…their loss of objectivity might be ascribed to their daily attendance at the trial which had tempted them into sharing attitudes, assumptions, and goals with the defendant's litigation team."
[14] Law Reform Commission - Consultation Paper Expert Evidence; December 2008 p 200.

It is not unheard of in smaller value cases for the expert witness to be an employee of the party in dispute or to have been retained in a professional capacity by the party during the construction project the subject of the dispute. This approach may not be ideal in view of the foregoing (not to mention to unavoidable scope it generally provides in cross examination to explore the credibility of the expert witness' evidence; "*the point of the spear*" being a sustained attack on his or her independence).

The adducing of expert evidence from an employee of a party is not specifically disallowed so long as the fact is made known to tribunal as soon as possible. The law in Ireland is that the state of employment of an expert is not taken to demonstrate bias *per se*. However, the relationship is something that the Court will usually take into account when assessing the weight to be attached to the evidence proffered by that employed expert witness.[15]

The most obvious source of financial interest is the fact that the expert witness is being paid by his instructing party unlike the usual witnesses of fact. Jessell LJ in the 19th century case of **Abinger v Ashton** did not couch his terms gently when he said:

> "*Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biassed [sic] in favour of the person employing him, and accordingly we do find such bias.*"[16]

As both parties to a construction dispute are likely to have engaged respective experts on a professional basis, the aphorism "*he who lives in a glass house*" would seem to adequately describe the scenario unless one of the experts displays notable partisanship.

The expert witness should endeavour to face his / her own perceived or actual bias in the formation of his opinion. A useful process would be for the expert witness to consider his or

[15] See **Galvin v Murray** [2000] IESC 78.
[16] **Abinger v Ashton** L.R. 17 Eq. 358, 373 (1873). See page 204 LRC op. cit.

her own published writings and, most particularly, his employment history and consider how these might be viewed in the harsh light of an adversarial contest.

This can be a sensitive and sometimes fraught process; however, it should be borne in mind that a cross examining advocate is unlikely to be sensitive in his or her exploration of the credibility of the expert in the attempt to undermine his or her evidence.

The expert should seek at all times to preserve his or her impartiality and should be seen to do so.

The expert should be encouraged to direct his instructing solicitor to any previous publications or co-authored works which might serve to contradict the proposition(s) being put forward in the case by the expert witness or otherwise. The dispute resolution team should also conduct their own survey of such works to ensure that surprise '*hostages to fortune*' do not appear for the first time on cross examination.

The peculiar intellectual interest of the expert witness may also be a cause of bias where the expert draws his opinion from a further border of the spectrum of acceptable expert opinion in the area.

This form of bias has been the subject of specific criticism in the UK's Court of Appeal in the notable case of **R v. Henderson**.[17] A properly diligent approach to the process of retention of the right expert witness will guard against this danger to the prospects of the case. A full analysis of all relevant publications of all of the expert witnesses in the case is a specific task

[17] **R. v. Henderson; R. v. Butler; R. v. Oyediran** [2010] EWCA Crim 1269, judgment delivered June 17, the Court of Appeal reviewed the authorities and gave comprehensive guidance as to matters of evidence and procedure which arose in cases involving "shaken baby syndrome", including expert evidence.

to be undertaken by the legal team (usually by a designated solicitor and junior counsel working in tandem).

As stated above, the use of "comparators" can be devastating effective in the context of otherwise arcane expert evidence. A good "comparator" can crystallise the involved details of the expert evidence in the mind of the tribunal. Therefore, an expert should be ready to provide useful and relevant comparisons in evidence. For example, all building structures and their constituent elements degrade over time; a defendant may posit that the defects experienced in the external cladding system of a given building are the result of the usual wear and tear experienced by a building in the inclement Irish environment. The Plaintiff's expert could effectively rebut this proposition is he or she were in a position to provide the tribunal with examples of similar buildings with a similar external cladding system situated in similar environmental conditions that have not experienced equivalent system failure ("comparators").

The simple fluff of not preparing such comparators can leave the witness floundering and vaguely grasping for them while in evidence which can quickly and decisively erode the standing of witness and the persuasiveness of his evidence in the mind of the tribunal. To be safe, the requirement to consider suitable "comparators" should be the subject of specific instruction to the expert witness.

As part of their analysis, expert witnesses should seek to identify and deal with "alternative causes" to those being advanced by the Plaintiff. The truly persuasive expert is one who is comfortable (when being pressed by adequately prepared and resourced counsel) to recognise that there are some things which simply cannot be explained or cannot be stated with complete certainty. That being said, the expert witness should be well acquainted with the other side's technical propositions when drafting his report. These "alternative causes" contrary to his expert opinion should also form part of the agenda of the meeting of experts. Competent examination is chief should also address these issues so that the expert gets to propound upon them while still '*in friendly hands*'.

The Meeting of Experts:

In **Weavering**[18] Charleton J stated that:

> *"Counsel for the parties offer immense benefit to the courts in narrowing the scope of the court's enquiry to what is essential in disposing of the case. These essential elements never consist of minute debate on obscure fact or the raising of legal argument so inventive that in its complexity it becomes self-defeating. Trials cease to be the fair disposal of the case where hearings are allowed to become so unwieldy that important evidence may be overlooked in a thicket of side issues, overburdened documentation and multiple challenges and cross pleas to the occlusion of what is essential. Not every litigant can afford to even risk a lengthy trial and few litigants can hire expert witnesses at will. Is it to be the case that if one side is better funded that more experts may be called on one side than on the other? There must be some regulation of the number of experts called at trial; otherwise wealth can unfairly enhance one side of the case to the ostensible impoverishment of the other. Apart from any issue as to experts, the system of court trial requires concision in order to be fair. Are the courts not entitled to structure hearings so that focus on issue aids the disposal of litigation in a time and cost effective manner?"*

Charleton J goes on to speak to Order 63A, Rule 6 of the Rules of the Superior Courts which informs the practice and procedure of the Commercial Division of the High Court ('the Commercial Court') where it states *inter alia*:

> "*Without prejudice to the generality of rule 5 of this Order, a Judge may, at the initial directions hearing-*
>
> *(a) of his own motion and after hearing the parties, or*
>
> *(b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing, give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:*

[18] **Weavering Macro Fixed Income Fund Limited (In Liquidation) -and- PNC Global Investment Servicing (Europe) Limited** [2012] IEHC 25

…….

(ix) directing any expert witnesses to consult with each other for the purposes of-

(a) identifying the issues in respect of which they intend to give evidence,

(b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and

(c) considering any matter which the judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations:

provided that any such outcome shall not be in any way binding on the parties."

Having quoted the above section of the Rules, Charleton J opines as follows in relation to expert witnesses:

"Considerable expert evidence is anticipated to be called at trial. It is essential that experts approach a case objectively and not on the basis of an unconscious desire to assist the side which engages them. Under Order 63A rule 6(1)(b)(ix) expert witnesses being called in opposition to each other may be required by the trial judge, or a judge hearing a preliminary motion or holding a case conference, to meet and to attempt to agree evidence. In that regard the judge may direct that the experts are to address their contrary minds to particular issues. The judge may also require them to draw up a memorandum of understanding as to what is agreed and what is not. Contrary to what was suggested in argument, an express provision seems absent from these rules similar to the Order 35.4 of the Civil Procedure Rules in England and Wales, which requires leave of the trial judge before an expert is called and restricts contradictory evidence to one expert on each side of an issue, unless leave is otherwise granted. The inherent power of the court may extend, however, to the control of unnecessary duplication in expert or any other form of testimony. The calling of multiple experts to give lengthy evidence is not always fair or helpful."

The meeting of experts prior to hearing is a vital part of the case preparation where both sides should work to narrow the issues in dispute. The process offers the opportunity of narrowing the issues significantly; thereby, shortening the length of hearing, managing costs and saving the scarce resources of the tribunal.

In the absence of definitive guidance contained in the Rules of the Superior Courts (other than Order 63A, Rule 6 RSC) to inform the parties agreeing, *inter se*, a reasonable structure and appropriate procedure to be adopted in the staging of an experts' meeting, a useful set of rules governing the meeting and managing the results of the meeting may be found in the **UK's Civil Procedure Rules Part 35.12**.[19] Regard might also be had to the UK's **Admiralty and Commercial Court Guide**[20] which addresses the issues of timing (there may be a need for several meetings), documents (avoid pre-meeting reports), venue, agenda, conduct of the meeting (liberty to discuss any aspect of the case without prejudice to agree as many issues as possible) and safely managing the production and the status of a joint memorandum arising from the meeting.

Increasingly, sophisticated parties who are otherwise in '*full combat mode'* tend to engage actively in facilitating the experts' meeting as the results of same have proven to be very positive in corralling litigation or arbitration sprawl without the loss of litigation advantage. However, dysfunction can arise, particularly when there is a large divergence in the resources of the Parties. In such circumstances, the less resourced party may consider it necessary to threaten to motion the other side so that the Court may set down how the pre-trial arrangements should progress.[21]

[19] See Appendix B.

[20] http://www.justice.gov.uk/downloads/courts/admiralitycomm/admiralty-commercial-courts-guide.pdf

[21] Even in the absence of explicit rules in High Court proceedings not suitable for listing in the Commercial Court, authority establishes clearly that the courts retain power to appropriately order the disposal of justice. **In P.J. Carroll and Co. Ltd. v. Minister for Health (No. 2) [2005] 3 I.R. 457** , Kelly J. referred at 457 to the "jurisdiction inherent in the court which enables it to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process". He referred to this power as one "which the court may draw upon as necessary wherever it is just and equitable to do so".

In the absence of such sophisticated engagement between the parties it is important that the Parties at least engage with one another in the drafting of an agreed agenda for the meeting of experts. The meeting should have a focus and specific goals. It should not be seen as a general discussion between experts. The Parties' experts should properly frame questions and issues to be discussed which should be circulated well in advance of the date of the meeting. The meeting should be minuted or, if possible, recorded and/or transcribed by a stenographer. Contrary to the innate instincts to "assist" which is inherent in the character of every lawyer worthy of engagement, the Parties' legal representatives should stay well away.

At best and, if properly stage managed, the meeting of experts may significantly narrow the issues to be contested by expert consensus and, in rare cases, bring about conditions for the settlement of part or all of the action. At worst, in the absence of the formation of any meaningful consensus, at least the Parties will know where the battle is to be joined at hearing.

Examination in Chief: 'Gentle Handling'

The key driver in preparing for the presentation of the case in chief is focusing the argument.

Traditionally, construction dispute resolution generates multiples of *banker's boxes* full of folders. Some key tips might be usefully noted in relation to expert evidence:

- Create from the professional literature a core bundle for the tribunal.
- Liaise with the advising expert on issues of particulars and discovery. Discovered documents that may have a nexus with the expert witness' evidence should be distilled and collated and forwarded to the expert witness with an explanatory memorandum.
- Most construction disputes of even a medium size require more than one expert witness. Each file pertaining to a different discipline should be in a different coloured folder. This simple organisational approach allows counsel to quickly reference the tribunal to a particular booklet (e.g. "Tab 4 of the blue book, Judge"; this ease of navigation will earn the gratitude and favour of the tribunal).

- Reduce; reduce; reduce. In the lead up to the hearing, focus on the central issues in controversy. A very effective tip from Michael Topolski QC (Tooks Chambers in the UK) is the use of the "*single page*". Mr. Topolski invariably equips his expert witness with a single sheet of paper whereupon the key propositions in controversy - culled and distilled from the expert reports - are set down in logical progression. All parties get a copy of that paper. Substantive examination of chief proceeds as follows;

  Q. You have six propositions set down on the paper in front of you

  A: Yes?

  Q: The first proposition at number 1 is that the piling design did not adequately factor in the ground conditions present on Little Island in Cork, Yes? Please tell the [tribunal] why, for the following 5 reasons numbered 2 - 6, you think this is (or isn't) the case.

  The success of this technique is obviously subject to the painstaking accuracy of the reduction process where thousands of pages of reports and supporting material are reduced to a single page.

  This apparently simple method can bring about the competent presentation of a 100 page expert report into evidence within 30 minutes where the judge can see what the expert is speaking to at all times.

  In addition to ventilating the expert's own views, the expert should be asked to comment on the competing views of the other sides expert(s). This allows the expert to deal with these issues in the relatively comfortable setting of examination in chief. These areas are certain to be revisited in the less comfortable environment of cross examination.

Weathering Cross Examination:

A useful 'lodestone' for competent cross examination is the acronym K.I.S.S. ('Keep It Simple, Stupid'). Competent counsel should start "low", focus on securing easy concessions and then build gradually; keeping the process as straightforward as possible at all times.

Competent counsel will ask simple questions, avoid compound queries and will rarely stray from giving evidence by way of leading question.

Gifted cross examiners may develop open questions in cross examination more freely. However, an expert who has been carefully fenced into an untenable position by careful progression through cross examination can effect '*escape and away*' if given the gift of an open question from a fumbling cross examiner.

Counsel seeking the elevated heights of mere competency should only stray into open question territory with certainty of purpose and, then, quickly return to closed questions; hopefully unscarred.

Hubris and Nemesis

A competent cross examiner is generally unlikely to land a critical blow on an expert in their field of expertise or send him crying from the court having been exposed as a liar, a fraud and a charlatan.

It is more often hubris deserving of a particularly abject nemesis for an advocate to think that he or she can materially disturb a competent expert in his or her own field. An expert witness is likely to have eaten, slept and breathed their expertise for a period of decades. The expert has considered and practiced his responses to the opposing expert's propositions and, as we have noted above, will have spoken to them as part of the examination in chief. Entering a war of attrition with an expert on the subject of his expertise is rarely an ennobling (or reputation enhancing) experience for a competent cross examiner.

Cautious Speed

Cross examination should be prosecuted with cautious speed. Try to avoid the joy of stalling on a point to repeatedly bang your head against the wall of the expert's deep well of knowledge; move deftly along the flexibly planned cross examination pathway. When you are informed by the tribunal that it understands the point and now might be timely to move on, your head is (figuratively speaking) already a bloodied mess. Take the hint.

Do not be a Birkett

An inappropriately aggressive and bullying cross of an expert is often counter-productive and may materially damage your case by alienating the tribunal (e.g. stimulating its protective instincts). This approach may also permanently impair the advocate's persuasiveness before the tribunal and may inadvertently buttress the expert's evidence.

There are times when the cross examiner may profitably press an expert with the full range of skill of an experienced advocate in the relentless search for a particular concession. However, starting "high" and maintaining a dismissive, superior and bullying tone throughout is rarely pleasant for anyone in involved and is unlikely to culminate in a pleasant result.

Choosing the Ground and Rhythm

In addition to the well-known shibboleths of competent cross examination of simplicity, speed, rarely straying from leading questions and an abundance of caution, you should always plan to join battle with an expert on your terms; if you have to fight, do so on the ground of your choosing and not that of the expert.

The prepared plan of questions should be tightly fashioned (although always flexible) to be delivered in a manner that maintains the beat of the engagement in your control.

Certainty Where There Shouldn't Be and Caveats Where There Should

A competent cross examination is designed to highlight any inherent uncertainties of the opposing expert's testimony and to prepare the way for the tribunal to prefer your expert's views on the central matters in issue. A competent cross examination peppers away at the credibility of the expert and tries to draw the expert into supposition where he or she might express views with certainty when the foundation of their opinion does not warrant such definitive statement.

Alternatively, a competent cross examination should aim to bring concessions, caveats and uncertainty to views and opinions previously expressed in definitive terms upon what was thought to be a sound foundation of analysis.

The Collusion Exposure

This is often an effective technique to be deployed in construction disputes where there is usually overlapping and re-enforcing experts. Where two experts for one side have overlapped their evidence on an issue in controversy it is appropriate to dip one's toe in open question territory by inquiring as to what extent have the experts discussed their evidence on that issue. To what extent is the view of Expert A based on the material or analysis or evidence of Expert B provided by one to the other? What if their shared assumptions are incorrect? Are their expert opinions truly independent?[22]

Lower Your Expectations

It is important to remember that a good cross examination is usually a "score-draw" where competent counsel has rattled a few of the expert's assumptions, drawn the target expert into advocating his side's position and the cross examiner has managed to increase the standing of his or her expert.

[22] With thanks to Jonathan Gaunt QC of Falcon Chambers for the pithy title.

(On the other hand, you should not have asked that last question and the expert made you look silly at least twice.)

Opportunity Knocks

Sometimes the unexpected happens and opportunity arises which preparation, experience and instinct inform your decision to press boldly into unknown territory. In such circumstances, the correct course of action is that which recommends itself in the few seconds between receiving the unexpectedly interesting answer and the enunciation of your next question.

Preparation, preparation and more preparation provides the best chance that this decision - made in the heat of contest - will turn out to be the right one. In order to be capable of diverting from plans it is essential that your preparation provides for flexibility of approach.

Developing your cross examination strategy in a **modular format** allows the cross examiner to move the examiner around the board and, in this instance, to react to unexpected happenstance (and then return seamlessly to the plan of attack).

"You Can't Handle the Truth"

Occasionally, the state of the case or the occurrence of unexpected misfortune during the hearing requires the cross examiner to go for an admission on cross examination that the expert "*ordered the code red*". As no less an advocate than Adrian Hardiman SC (as he was then) opined;

> *"Sometimes, however, the expert testimony is so unambiguous and so central to the case that there is no alternative but to take it on with a view to undermining it seriously or forcing a major concession."*[23]

[23] "The Role of Expert Witness" Adrian Hardiman SC, 1991.

Good luck….

Fail to Prepare…

All cross examinations, and certainly in the circumstances of the foregoing daunting prospect of the *'Code Red'* strategy, diligent preparation is the vital ingredient. In construction cases, obviously (particularly in the larger value proceedings) working efficiently in a team context is vital to the prospects of success.

The first order of preparation, assuming you have a thorough command of the materials of your case, is to design a flexible matrix for the cross examination.

You should set down the core issues in the case in the context of your overarching case strategy. Focus the preparation of the cross examination on the areas of the case that have real import and are likely to be of interest to the tribunal; namely:

(i) the particularly contentious disagreements between the experts;
(ii) the essential comparables; and
(iii) the fundamental elements of your closing / final arguments.

Your expert witness(es) or litigation advisor(s) will also generally be able to provide you with possible lines of inquiry informed by his or her scepticism and inklings of the vulnerabilities of the other side's case (which in the case of the expert witness may have been mere harboured suspicions inappropriate for inclusion in his or her expert report).

From Closing to Cross

A technique employed by many competent cross examiners is to begin their cross examination preparation by first drafting a version of their closing speech. A tribunal will usually reject facts, issues or views that were not put to the other side's witnesses or which are at odds with

the other side's evidence that remained unchallenged during the other side's evidence. The drafting of a version of the closing will distil the essential blocks which will be required at the end; therefore, highlighting for the advocate the essential challenges to be made on cross.

Why is the expert here?

It is essential to have a clear view of why the opposing expert has been called to give evidence. Working closely with your own expert witness and/or the litigation adviser you may set down the nodes or points of attack on the issues in key controversy.

Scope of the Cross

As stated above one should always be aware of the scope of the cross examination; regardless of what the expert provides by way of evidence in examination in chief, he or she is available to answer any relevant question which falls within his or her field of expertise.

Foster Agreement and Appreciation of your Expert

You should emphasise those areas where the experts agree.

You should deftly elicit the endorsement of your expert when the opportunity naturally arises.

Early Concessions and Establishment of Standing

Entry level competence requires a familiarity with the expert's area of expertise. Competent cross examination is a form of advocacy. The purpose of advocacy is persuasiveness.

A competent cross examiner will seek to establish his familiarity and "command" of the relevant technical matter early in the cross examination to establish/maintain standing in the mind of the tribunal and will seek to nullify the expert adopting a patronising tone / attitude.

Most cross examinations begin "low" with some initial fencing and rebuttal queries that may have arisen during the examination in chief. This initial treatment should involve the isolation and securing of relatively uncontroversial concessions ("Can we agree therefore…"). It is best to deal with these elements early before the relationship between the cross examiner and the expert becomes less friendly.

After the completion of the above preliminaries, it is essential that the first substantial pass between the expert and the cross examiner is on the advocate's strongest issue. This approach offers the best chance that arising from that first substantial exchange the competent counsel emerges enhanced in the eyes of the tribunal.

If it goes well it should also discourage the expert from "*talking down*" to you and will encourage the expert to agree with further propositions that you put to him or her.

It is also the case that if the cross examiner establishes a contradiction in the expert's evidence in this first key engagement, the expert is more likely to qualify his or her following evidence.

Finally, it provides the best opportunity of tempting the expert into dogmatic and inflexible advocacy in support of his side's case before he or she acquires a measure of your strategy.

Pleadings

A competent cross examiner should be alert to subtle differences of expression or emphasis in the expert's evidence in comparison with the pleadings of his side. It may well be the case that the expert is not full-square in agreement with the case being put forward by the other side. Any minor shift in tone or stress noted may be profitably put to expert directly in the context of the pleadings.

Hoisted on One's Own Petard

If the expert has authored works on the subject(s) in controversy these publications should be studied carefully by the cross examiner (note: do not ignore the footnotes!). As a first step, relatively early in the process, the legal team should have compiled a detailed report (authored by solicitor / junior counsel) on the relevant publications (see above).

The tone of articles written for presentation to professional peers or academia are often more measured and balanced in tone than that adopted in an adversarial environment. This tonal juxtaposition can often present the opportunity of direct contradiction of the expert by his own hand.

Taciturnity

Taciturn responses to opening queries is usually an indicator that the expert has acquired some experience as a court performer. This tactic should be anticipated in order to avoid the "rookie" error of resorting to the open question to elicit more from the expert. An experienced expert may well take the opportunity presented by such an open question (e.g, "*And why do you say that*") to have a free run on reprising his or her earlier evidence and adducing additional supporting material not put in evidence earlier.

A competent cross examiner should anticipate this common tactic and should have prepared a drill down set of queries (particularly in the first several areas of exploration) designed to drag the expert along the line of cross examination detail by painstaking detail.

It is not inappropriate to increase the tone of the cross if the witness opts for this strategy. Almost inevitably, in the face of persistent command of the material the taciturn expert will abandon the tactic of inadequate responsiveness and engage in substantive responses to the queries presented.

Divide and Conquer:

If the case involves multiple defendants, for example, where the project architect and the structural engineer are co-Defendants this may present the opportunity to turn one Defendant's expert against the other. For example, the expert appearing in support of the project architect may agree that, although, his client was not negligent in his or her supervision of the project entire the structural engineer Co-defendant was negligent in the design of the beam supports and water tank placing in the upper floors which were his or her sole preserve. Grist to the mill….

Resist the retreat into technical language

Although it is important for a competent cross examiner to establish their standing in the eyes of the tribunal by consistently demonstrating a decent command of the technical issues, the expert should not be allowed to draw a veil between the questions posed and plain useful responses by using arcane or technical language.

If the issue is fundamental to the case, the competent cross examiner should politely insist that the expert explain the terms or concepts in common parlance to ensure that the cross examiner but more importantly the tribunal understand the responses fully. Further, in this regard, care should be taken to ensure that technical language is not misused to paint a picture of fake certainty.

Sit Down

My first, last and favourite rule: do not ask that last question. Really…do not do it. I know that it is really a good one. Don't.

Instead repeat your best question rephrased in as leading a manner as possible and then sit (quickly).

Conclusion:

It is essential that the tribunal as the master of procedure controls the expert evidence and that the tribunal is supported in doing so creatively and reasonably by both sides to prevent the hearing from developing into a sprawling morass and to ensure that the essential evidence is presented and explored sufficiently to allow and enable the tribunal to find the truth of the matter.

Construction dispute resolution is a team game where client, solicitor, counsel, witnesses of fact and experts should work together.

A coherent and effective team arrangement is the optimum structure to allow for comprehensive preparation and deployment of expert evidence; together we stand.

Jonathan S. FitzGerald BL

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-END-

Appendix A – Law Society of Scotland
Code Of Practice: Expert Witnesses Engaged By Solicitors

Introduction

This Code is intended to assist experts to ensure that they can effectively meet the needs of solicitors, so those solicitors can in consequence better serve their clients and the interests of justice. They are intended to be of general application and there may be additional requirements relating to cases in specialised areas of law.

Acceptance of instructions

1.
Experts should ensure that they receive clear instructions from solicitors (in writing unless this is not practical) specifying the solicitor's requirements, which should cover:

(a)
Basic information such as names, addresses, telephone numbers, dates of birth, and dates of incidents;

(b)
The type of expertise which is called for;

(c)
The purpose for requesting the report, and a description of the matter to be investigated;

(d)
Questions to be addressed;

(e)
The history of the matter, identifying any factual matters that may be in dispute;

(f)
Details of any relevant documents:

(g)

Whether proceedings have been commenced or are contemplated, the identity of the parties, and whether the expert may be required to attend to give evidence;

(h)

Whether prior authority to incur the estimated fees needs to be obtained by the solicitor before the instructions can be confirmed;

(i)

In the case of medical reports: where the medical records are situated (including, where possible, the hospital record number); whether or not the consent of the client/patient to an examination and disclosure of records has been given; and whether or not the records are to be obtained and provided by the solicitor;

(j)

In cases concerning children, a note that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.

2.

Instructions should be accepted only in matters where the expert:

(a)

Has the knowledge, experience, expertise, qualifications, or professional training appropriate for the assignment;

(b)

Has the resources to complete the matter within the timescales and to the standard required for the assignment.

3.

A time limit for the production of the report should be agreed. When the agreed time limit cannot be met, notice of the delay should be communicated at the earliest opportunity.

4.

Experts should make clear to solicitors what can and cannot be expected on completion of the assignment. In particular, as soon as possible after being instructed, they should identify any

aspects of a commission with which they are unfamiliar, or not professionally qualified to deal, or on which they require or would like further information or guidance.

5.

If any part of the assignment is to be undertaken by parties other than the individual instructed, then:

(a)

Prior agreement must be obtained from the instructing solicitors;

(b)

The names of the individuals to be engaged and details of their experience and qualifications must be given.

6.

Where a firm has been instructed, the names of the individuals to be assigned to the project and details of their experience and qualifications must be given on request.

Terms of Business

7. Experts should provide Terms of Business for agreement prior to the acceptance of any instructions. These should include:

(i) Daily or hourly rates of the experts to be engaged on the assignment or alternatively an agreed reasonable fee for the project or services;

(ii) Treatment of travelling time;

(iii) Travelling or other expenses or outlays;

(iv) Rates for attendance at court (note that this may be subject to a fixed limit);

(v) Provision for payment of a specified fee in the event of late notice of cancellation of a court hearing;

(vi) Provision for preferred timing of payment.

Professional conduct

8. Experts must comply with the Code of Conduct of any professional body of which he/she is a member.

Confidentiality

9. The identity of the client or any information about the client acquired in the course of the commission shall not be disclosed by the expert except where consent has been obtained from the client or where there is a legal duty to disclose.

10. A solicitor is usually under a duty to pass on to the client all information material to the client's case; exceptional circumstances where this may not apply, and where it will be necessary for the solicitor to decide whether to disclose such information to the client, include cases where it could be harmful to the client because it will affect the client's mental or physical condition (for example, a medical report disclosing a terminal illness).

Independence

11. Experts will bear in mind that:

(a) When giving evidence at court, the role of a witness of fact, or an expert witness, is to assist the court and remain independent of the parties;

(b) A solicitor must not make or offer to make payment to a witness contingent upon the nature of the evidence given.

12. Experts will disclose to solicitors at the start of each project any personal or financial or other significant circumstances which might influence work for the client in any way not stated or implied in the instructions, in particular:

(a) Any directorship or controlling interest in any business in competition with the client;

(b) Any financial or other interest in goods or services (including software) under dispute;

(c) Any personal relationship and/or professional relationship, and the nature thereof, with any individual involved in the matter;

(d) The existence but not the name of any other client of the expert with competing interests;

(e) Whether the expert has worked with the expert instructed by the opposing party (if known).

13. Any actual or potential conflict of interest must be reported to the solicitor as soon as it is raised or becomes apparent and the assignment must be terminated.

Investigation

14. Experts should consider whether there is a need to see the client, visit a site etc, and if so, agree the practical arrangements with the solicitor in advance.

15. In the case of medical reports:

(a) If the doctor has treated the patient before, ensure that the patient's consent has been obtained to the release of the information contained in the notes and that such consent is informed consent;

(b) If the doctor has not treated the patient before, ensure that the patient's consent is obtained to the examination and to the disclosure of their records to the doctor; and, where practicable, consent of the other doctors involved in the care of the patient should be obtained before releasing information held by them.

Preparation of the report

16. The report should cover:

(a) Basic information such as names and dates;

(b) Purpose in presenting the report, and description of matter investigated;

(c) The history of the matter;

(d) Methodology used in investigation;

(e) Details of any documents used;

(f) Facts ascertained;

(g) Inferences drawn from the facts, with reasoning;

(h) Summary of the expert's qualifications and experience.

17. Plain English should be used and any technical terms explained.

18. Copies of any document or papers referred to in the report should be provided; any items referred to may be subject to recovery by commission in any court proceedings and experts should ascertain from instructing solicitors whether or not in view of that it is appropriate to refer to documents provided by the solicitor; it is unnecessary to copy widely and easily available documents.

19. The expert's final report should be dated and signed by the individual(s) who will if required give evidence in support of it.

Complaints procedure (if requested)

20. Experts should provide a procedure for resolving complaints by solicitors, including the following:

(a) If there is a complaint, the expert must give the solicitor client the name of the person to contact in the event that they are dissatisfied with the service provided;

(b) In the event of a complaint being made, the expert should:

(i) Tell the solicitor what the procedure will be for resolving the complaint;

(ii) Respond appropriately offering any appropriate redress in a timely manner;

(iii) If the solicitor remains dissatisfied, give them the names and addresses of any professional or trade bodies of which the firm or the individuals assigned to the commission are members;

(iv)Identify the cause of any problem and correct any unsatisfactory procedure.

(c) In the event of allegations relating to an Expert's failure to adhere to the above Code of Practice or any breach of their contract with the instructing solicitors, The Law Society of Scotland and W. Green reserve the right to exclude such an Expert from any future edition of the Directory of Expert Witnesses.

References to the Directory

21. An expert listed in the Directory may describe themselves as so listed. The expert may not refer to this listing as a qualification or describe themselves as approved, accredited, or recommended by The Law Society of Scotland and W. Green.

Appendix B – Civil Procedural Rules - Discussions between experts

35.12

(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to –

(a) identify and discuss the expert issues in the proceedings; and

(b) where possible, reach an agreed opinion on those issues.

(2) The court may specify the issues which the experts must discuss.

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court setting out those issues on which –

(a) they agree; and

(b) they disagree, with a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.