DISPUTE RESOLUTION

Expert Witnesses – An Arbitrator's View

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YOU HAVE, NO DOUBT, BEEN PROvided with comprehensive advice regarding the legal requirements for the giving of expert evidence to either a court or a tribunal empowered to bring down a binding decision enforceable by a court. I do not wish to dwell on these matters in this article, other than to make a few practical, rather than legal, comments. Then I shall refer you to the recently adopted *Rules for the Conduct of Commercial Arbitration*, drawn up by the Institute of Arbitrators and Mediators Australia, in which emphasis has been placed on flexibility and expedition of procedure. This emphasis impacts a great deal on the way in which expert evidence is received and tested in arbitration, particularly before a lay (non-lawyer) arbitrator, and will therefore effect the way in which you prepare your expert opinions and provide your evidence.

Critical principals in the provision of expert evidence include that it be given with *impartiality*, supported by *reason* and offered by a person *suitably qualified* in the field on which the opinion is based.

IMPARTIALITY

The provision of evidence which is biased toward the client is, in my experience, common and carries with it certain dangers. Apart from the overriding obligation which a witness has to the tribunal to assist it in arriving at the truth, there are other considerations. Importantly, a client can rarely be helped in the end by being given an overly optimistic view at the beginning, as an unsuccessful law suit or arbitration reference will cost the loser a large amount of money. From the expert's perspective, while fees may be extracted for an opinion which is exaggerated, a habit of this kind will lead to a poor reputation and diminished commissions.

You will frequently be instructed as an expert in advance of the commencement of legal proceedings. Initially your opinion will assist in the decision of whether or not to start proceedings. Alternatively, you may be commissioned by the defence shortly after a reference has been triggered to advise on the strength of a defence or possible cross-claim. To provide an opinion which is less than frank in either case will bring about certain consequences.

If your client relies on it, you will be asked to commit your expert opinion to writing. An opposing expert will then be given your report and asked to respond. If that expert has forensic skills it will be dissected critically and the weaknesses exposed. Your clients however, at that stage, may not recognise that. They are unlikely to be skilled in the technical area of the dispute and may still have confidence that your view will prevail. It is, after all, the one which suits their interest and so they will be predisposed to like it.

As the battle proceeds, a hearing a will take place and you may be called for cross-examination. This process is conducted clinically and generally without mercy. If you have exaggerated or provided an opinion without foundation it is likely to be exposed and you are likely to be embarrassed. Alternatively, you may appear before a referee or arbitrator in conclave (which is explained in more detail below). The severity of the humiliation of cross-examination may be avoided here but the result may be worse. A lay arbitrator, skilled in the technical area of the dispute, will often appreciate the problems canvassed in your evidence swiftly with a perception which leaves little room for persuasion. The end result will quickly become obvious if not explicit. You will have the opportunity to recant (and many witnesses do at this stage) but you will be left with the unenviable task of explaining why to your client.

There are, of course, degrees of impartiality. We all lean to some degree toward our clients' interests. That is natural and it is sometimes difficult to discern just where a

bias begins, but a line must be drawn. The personal test may be to ask yourself: 'If I were being called by the other side on this issue what would I say?' The answer really should be: 'the same thing'. If you are called as a defence witness where allegations of defective work are raised, it may be that on many issues your opinion is that the work is either not defective or can be rectified simply or at a price well below that being claimed and it is proper to say so. But where you agree with some of the allegations you must admit them. On the other hand, if you see further areas of work, which in your view are defective but have not been claimed, there is no need to say so. You are only there to provide an opinion on those issues which have been raised in the pleadings and brought to trial. You have no obligation to be frank about those which have not.

A typical example of a defect which is commonly claimed in construction work is the failure of a builder to provide weepholes in a painted rendered masonry wall. On one occasion I heard evidence from an expert in defence advancing the view that most buildings are constructed now without weepholes, that the render on a masonry wall will prevent moisture from penetrating the outer skin, and that weepholes are therefore not necessary as a means of allowing otherwise trapped moisture to escape. In addition, I think what was being suggested was that, even though the provision of weepholes was a requirement of the specification, there was no loss suffered from the failure to provide them and it was therefore not a legitimate claim. I was not the arbitrator and to my surprise the defence succeeded.

Whilst I held a different view, I accepted that the opposing opinion had been honestly given. I was therefore disconcerted to find that the same claim was included on a defects list prepared by the same expert some months later when engaged by an owner plaintiff on a different project. Clearly the test mentioned above had not been applied and perhaps he remained unaware of the inconsistency.

THE NECESSITY FOR REASONS

As I am sure you have been told, it is a requirement of the provision of expert evidence that any opinion advanced must be supported by reason. Sadly, in real life, expert opinions are often tendered, without objection, with slabs of reason missing. This does not assist the arbitrator and it is unlikely to assist your client. In my opinion it is best to take the time to provide all of your reasons for your opinion clearly when preparing an expert report.

At the commencement of an expert report the assumptions on which your opinion is based need to be clearly set out. You should, for example, state which documents you have seen, what, on your instructions, constitute the contract documents and/or any oral terms, and what general principals of practice you are relying on to formulate your opinion. These will form many of the premises of your argument or viewpoint. Once this is done, your detailed opinion with reasons on specific issues can be set out.

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To take the weephole problem mentioned above, it is not uncommon in a construction dispute for an expert opinion relating to allegations of defective work to be provided in the form of a schedule. In its simplest form it may be set out as indicated below:

If the defect has been pleaded as a breach of contract, in my opinion the schedule, or whatever form the evidence takes, should include references to: the contractual requirement for weepholes, including express clauses in the specification; any detail drawings indicating weepholes; BCA requirements; any relevant Australian standards; your own opinion of good workmanship; any consequential defects arising from

ITEM	COST TO RECTIFY
1. No weepholes in brickwork	$4,500.00

the alleged breach, such as damp discoloured areas of the wall or peeling, bubbling paint; the proposed method of rectification; the quantities of both material and/or labour estimated in the rectification process; and, at some point in the report, an explanation of how the figures used were arrived at. For example, were labour rates taken from the contract, from Rawlinsons, from MBA published rates, from the expert's experience of the current market etc? What percentage has been allowed for overheads and profit and how have these percentages been arrived at? Whilst this may seem tedious it indicates clearly to the arbitrator and to your client's opponent every step of the way in the formulation of your opinion. It may turn out that only some aspects of the claim are in issue. They can then be clearly isolated. Alternatively, all aspects may be in issue but the arbitrator may accept your evidence on everything other than, for example, the labour rate. On that alone she may prefer the evidence of the other side. When your opinion is set out clearly it allows her not only to provide cogent reasons for her own decision, but to calculate an award amount with ease.

QUALIFICATIONS

Opinion evidence is only admissible if it is provided by a witness who has expertise in the area on which the opinion is based. At the beginning of your reports you should state what your qualifications are, in the form of a brief curriculum vitae, sufficient in length to enable the tribunal to assess whether or not you are suitably qualified to provide the opinion evidence which is being tendered.

Expertise can be gained through formal training, experience or, ideally, a combination of both. In writing your reports you should therefore not stray into areas which fall outside your own area. To take the old weephole problem again — if you have qualifications and experience in building and quantity surveying you are ideally placed to provide opinion evidence on whether or not the provision of weepholes in masonry construction constitutes good workmanship, what the consequences of their omission might be, what might be done to rectify the problem, if you perceive one, and how much the rectification might cost. You cannot, however, provide an opinion on whether or not the failure to provide weepholes constitutes a breach of contract or what the Owner's rights might be in respect of that breach as these are legal, rather than building, issues.

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In the same example, if there are two defendants, a builder and an architect, you would be qualified to give evidence which is relevant to the claims against both, but you would not be qualified to provide opinion evidence on the duty of an architect to specify weepholes. That evidence, in my opinion, would need to be given by an architect. It may be surprising, but many experts seek to provide views which they are not qualified to advance in legal proceedings. If you prepare your evidence with the distinction in mind you will show yourself to be more sophisticated than many.

RULES FOR CONDUCT OF COMMERCIAL ARBITRATION

I wish to refer you to Schedule 1 of the *Rules for the Conduct of Commercial Arbitration* recently adopted by the Institute of Arbitrators and Mediators Australia. The document summarises the typical procedural rulings which it is open to an arbitrator to make during the course of a reference and many of these are relevant to the provision of expert evidence.

In Schedule 1, rules 2 to 6 are directly relevant to expert testimony and state as follows:

> *The arbitrator may make such directions or rulings as he or she considers to be reasonably appropriate, including in respect of the following:*
>
> *2. The preparation of any joint statement of issues, in such manner and at such time as the Arbitrator considers appropriate, to define and narrow the issues in dispute.*
>
> *3. The holding of further Preliminary Conferences, meetings between experts and/or representatives of the parties, or Experts' Conclaves chaired by the Arbitrator, so as to narrow the issues in dispute, including the time at*

which and manner in which they are conducted and who may attend, and preparation of any written document recording the results thereof.

4. The preparation of joint reports by experts engaged by the parties following any meetings between such experts or any Experts' Conclave, recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for any such disagreement and their respective contentions in relation to same.

5. The preparation of joint bundles of documents for use in the arbitration, including, at any meetings between experts and/or representatives of the parties and any Experts' Conclaves, or preparation of any joint report of experts.

6. The provision of factual information to experts for the parties for use in their joint deliberations or preparation of any joint report.

As indicated above, the general assumptions upon which your opinion is based should be set out in your report. Often experts on opposing sides will be given different sets of instructions from their respective clients. It is not surprising therefore that they come up with different points of view. Rules 2, 5 and 6 enable the arbitrator to direct that the experts be provided with a joint bundle of documents and or a joint statement of agreed or even disputed facts on which they can deliberate. This allows them to consider the same factual material so that the real issues, in terms of opinion evidence, may be narrowed.

When facts are in issue the experts may be able to agree on their opinion evidence depending on what facts are ultimately proven. To take again the problem of the missing weepholes — the Owner's expert may have put this defect into issue without having been provided with an amended specification which removed the cement rendering from the Builder's contract. The Builder's evidence may be that his bricklayers left weepholes but the cement renderers, who were later engaged by the Owners, rendered over the top of them. The Owners may dispute this and say that whilst there was some discussion on amending the specification it was never agreed to and that the Builder was responsible for supervising the renderers and that the error was his. Properly instructed on all this and being provided with the contested specifications, the experts may agree on whether the work is defective and, if so, what the likely cost of repair will be. They may also agree that if the work under the control of the Builder is found to exclude cement rendering, the Builder's work is not defective on this item. This only leaves one fact in contest and no further evidence is required of the experts on the issue.

Until recently/the term 'conclave' was generally reserved for a secluded meeting of cardinals to elect a new pope. For some reason it has been adopted in NSW to describe a meeting of experts canvassing the issues between the parties and attempting to agree upon as many matters as possible and isolating those upon which they cannot agree. Often these conclaves result in a joint report being prepared by the experts and frequently the experts are directed to provide one. One advantage of this is that when the issues are isolated in such a way the parties' attention becomes focused on them and they can often be guided to a settlement. Rules 3 and 4 facilitate directions regarding these meetings and any resulting joint reports.

Conclaves can be conducted in three basic combinations:

▶ between the experts with no others present;

▶ between the experts with the arbitrator present and with the lawyers present but taking a back seat;

▶ between the experts with the arbitrator present and with no lawyers.

All three are commonly used. The first is normally and ideally used prior to the experts finalising their statements of evidence. Under those circumstances the experts can usefully be asked to meet and prepare a joint report. They may even be asked to conduct tests jointly.

The second is commonly used where the experts have isolated those issues on which they cannot agree and the arbitrator wishes to meet with them to hear what they have to say on the disputed issues. This method is normally used as an alternative to cross-examination and the principal advantage, in my experience, is that witnesses do not become so polarised to their own viewpoint if a reasonable alternative is raised which they have not previously considered. Alternatively, if they have exaggerated an opinion

they can recant without the normal loss of face accompanying cross-examination. This frequently happens when they realise that what they are saying to two people skilled in the area of dispute, in the cold light of day, is not convincing.

The third combination has the same purpose as the second and is often used when the parties are arguing over a relatively small amount of money and are attempting to conserve costs.

There are some dangers associated with these conclaves. In my opinion, it is important that expert witnesses are sworn in and that their statements are tendered prior to the commencement of a conclave with the arbitrator. Not infrequently, when I have sat in a conclave of experts, one expert attempts to introduce a document which has not before been tendered or exchanged in an agreed bundle of documents. If it is a document, such as a Rawlinsons pricing book, which has been referred to in the witness's evidence but not annexed, I would not reject it. But if it is a document which has allegedly been authored by one of the parties, the arbitrator should not consider it and, as an expert, you should advise that you are unable to provide an opinion based on it until you take instructions on the status of the document. If lawyers are present they will deal with the problem immediately, however, if they are absent you should do what you can to protect your client.

As indicated above, the real purpose of expert conclaves is to allow the experts and the arbitrator to consider the contested opinions in a less formal and less confrontational atmosphere than occurs in cross-examination, and to allow the arbitrator to participate in the discussion. A good expert may, under these circumstances, see merit in a point of view which has not before occurred to him or her. Discussion between experts sometimes develops into a joint opinion, not previously expressed. There is a great deal of merit, in my experience, in this process. There are, however, dangers — not necessarily attached to the process, but to it taking place with inexperienced or unprofessional experts. What occasionally happens is that at least one of the experts perceives the process as a bargaining event and takes a 'you give me this and I'll give you that' approach. Whilst this process may have been useful at an earlier stage of the dispute, in the negotiation phase and on instructions from the clients, it is, in my opinion, inappropriate for experts to conduct themselves in this way. They have, after all, by this time sworn to the truth of their statements and they are there to assist the tribunal in arriving at a result based on the merits of their opinions. I have little doubt that on most occasions they have not been instructed by their clients to act in this way and are in effect selling their clients short so as to avoid any genuine contest exposing their own somewhat shaky opinions.

'The real purpose of expert conclaves is to allow the experts and the arbitrator to consider the contested opinions in a less formal and less confrontational atmosphere than occurs in cross-examination'.

My advice to you is to provide a genuine opinion in the first place and stick with it unless you can see a flaw. It is not a bazaar and you are not there to make professional compromises. In fact, your professional reputation depends upon you acting with integrity and honesty. ■

Janet Grey is an Arbitrator and Mediator, and is currently Vice-President of the Institute of Arbitrators and Mediators Australia. This paper was originally presented at the Australian Institute of Quantity Surveyors' Expert Witness workshop, held at the University of Technology, Sydney on 24-25 June 2000.