

# Practical use of expert witnesses in building disputes

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## How and who to engage as an expert witness

Whilst having a primary duty to the court/tribunal experts provide a critical service to lawyers and clients in the resolution and determination of building disputes. The acceptance or rejection of an expert's evidence in many cases is critical and can have a decisive effect on the outcome of a building dispute.

A legal practitioner has a very important role to play in the engagement of the 'right' expert/s in any litigious matter, and especially in a building dispute.

The **Evidence Act 2006** ("the Act") has replaced the common law in relation to the admissibility of expert evidence.

Firstly, one has to recognize that an expert is required. In that regard as a lawyer one needs to be aware of the issues in the proceeding. There are different types of experts for different types of issues in building cases. The type of expert that may be useful is not always immediately clear and one will have to consider the fact, law and issues carefully, so as to get an appropriate expert for your client's needs.

Assess your client and his claims. Test what your client tells you by questions and consider opposing scenarios. Use your judgment to assess what is required.

Assess what evidence is required to give your client the best chance of success. Your client may be an 'expert' or qualified in the profession/undertaking/occupation in issue, but can he be seen as being able to impartially give evidence to that could be assessed as being 'impartial' and 'independent'.

Your client may seek to give evidence (expert) on an issue ie. Whether he did the work complained of properly or not. He can do this but he may be subject to the rules of the court/tribunal requiring an expert witness statement signed off from the witness even though it is your client or an employee of your client. Its better to file an expert witness statement

for your client or his/her employee than not, as not doing so could trigger an adjournment and costs if the other side can show they are taken by surprise.

As one would be aware there is a vast array of different types of building practitioners such as architects, engineers, quantity surveyors, programmer, carpenters, concreters, electricians, plumbers...etc. etc. and the same can be said for expert witnesses in building disputes. There are a number of 'building experts' who may describe themselves as 'building consultants' who are generalist-building experts. Some of these may be 'acceptable' experts, but as a lawyer you need to carefully consider whether your client's interests are going to be best served with a generalist-building expert or whether a more focused building expert/s would provide a more specialised level of information, advice and evidence.

Section 4 of the Act has the following definitions:

**expert** means a person who has specialised knowledge or skill based on training, study, or experience

**expert evidence** means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion

Section 25(1) of the Act prescribes the basis for the admissibility of expert evidence as requiring "substantial help... in understanding other evidence in the proceedings or in ascertaining any fact that is of consequence to the determination of the proceeding"

This effectively means the evidence must in the eyes of the court be of sufficient reliability and worth to provide "substantial help" to the Court.

It is noteworthy that under Section 25(2) of the Act an expert can even give an opinion on the ultimate issue to be determined by the Court or Tribunal. However, in practice it may be a brave expert who dares to encroach upon the territory of the ultimate decision maker. The fact is however that in many cases experts will give evidence that works are defective or that there have been undue delays in the carrying out of works, which are ultimately issues for the ultimate decision maker to determine.

## Protocols in the engagement of expert witness

There are a number of sources from which you may source an appropriate expert, these include:

- (a) experts you have previously used or observed yourself;
- (b) experts who have received judicial praise or acceptance of his/her evidence in other cases;
- (c) referrals from other lawyers/colleagues;
- (d) referral from your client;
- (e) contact relevant professional/trade associations or bodies;
- (f) internet search;

After you have the name/s of an expert or some prospective experts you should then contact that expert personally.

Ensure that there is no conflict of interest with the proposed expert.

As a lawyer one will need to briefly discuss the case with the expert and identify if the issue/s is/are within the scope of that expert's expertise. Also it is important for you as a lawyer to gauge the expert. For instance does the expert vocalize and present well. First impressions count and presentation in both the statement and as a witness are paramount.

One should also consider the experience of the expert in light of the dispute at hand. In a building dispute – depending upon whether it is a commercial or residential building dispute the prior experience of the expert may add greater value than another to your client's case.

One needs to enquire from the expert as to their rate of remuneration. The engagement of the expert should either be directly between ones client and the expert or alternatively, it is incumbent upon the lawyer to ensure that one has sufficient funds in trust to cover the experts fees.

At the outset one must ensure that the expert is apprised of the relevant "Code of Conduct" for expert witnesses (e.g. High Court Rules – Schedule 4). There are almost invariably Codes of Conduct for experts in all courts and tribunals.

If one sends written instructions to an expert, one should be aware that such communication can be called for by an opposing party before the court or tribunal, where that expert is called to give evidence. In that regard the contents of such communication can be problematic if they go beyond asking for an opinion. Similarly if the expert is mis-informed as to any matters that leads him/she to make false assumptions that can have a significant impact upon the expert and the usefulness of his/her evidence in a case.

One needs to carefully craft the questions for the witness to determine. Provide the expert witness with a copy of relevant documentation. Ordinarily this is by the provision of opposing expert/s report/s.

### Working in conjunction with an expert witness

Particularly in building disputes it is important to engage an expert at an early stage, before the physical conditions of the subject matter are altered or becomes inaccessible. It can be very useful for the legal practitioner to accompany the expert to an inspection. In that way the lawyer can get a feel for the nature of the claims, and get a better understanding of what is being complained about.

As a lawyer one should test an experts analysis before it is finalized. It is critical that the expert bases his opinion on the facts as they are likely to be found at the final determination of the proceeding. If ones expert does make assumptions then those should be clearly stated. For example where an expert says that an item is not a defect, but if (which is not denied) it is found to be an item requiring rectification, the expert could prescribe a rectification methodology and cost. This protects the client in circumstances where the other expert may have prescribed an excessive rectification methodology and cost.

### Presentation and use of expert reports

Expert reports should contain all the matters stated in prescribed court and tribunal code of conduct. This is very important and practitioners should seek to ensure that compliance occurs before any expert statement or report is submitted.

Where an expert is responding in a report/statement to another expert's report/statement the same numbering system should be adopted just as occurs in pleadings. This provides an easy cross-reference basis.

Photographs are very useful when embedded into a report next to the issue being discussed to easily identify a defect or issue; experts should be encouraged to do so.

Occasionally, experts may be asked to provide a joint report, this should not mean that one expert is obliged to adopt views which he does not accept. Some experts know one another and one expert should be cautioned about agreeing with a proposition of an opposing expert, just to get along with his/her 'mate'.

Caution should be exercised when an opposing party seeks to have an expert jointly appointed.

Expert reports frequently contain spelling and other mistakes. One should ensure that the report as a 'draft' be submitted to the legal practitioner for checking prior to the final report being submitted for filing and service. One should not underestimate the significance of what might appear to be obvious errors occurring in an expert report in the mind of the ultimate decision maker.

### Preparing a case with the use of expert evidence

Some experts may never have given evidence in their life. Others will have given evidence on many occasions.

Test the reasoning of experts. Ultimately an expert's opinion must be transparent. The reasons for the opinion must expose the process by reason of which the conclusion is reached. This means one must put the microscope over the expert's opinion/statement/report and prospective evidence. A useful way of testing this is to put propositions to the expert that arise or are asserted in opposing expert reports.

A court or tribunal will be much more inclined to accept the evidence of an expert if his/her evidence is shown to be impartial and even handed. If there is an issue that is 'dead in the

water' an expert who fails to see the reality of that may affect his own credibility in a major way.

It is important that an expert understands that he 'must' answer the question that is put to him in court or before a tribunal. Experts have a paramount duty to assist the court or tribunal. This process is not about the expert making a speech. He/she will be asked specific questions and direct responses are appreciated, unless the expert is asked to 'explain'. Some experts make the mistake of trying to say everything about the matter in response to a simple question, this can be interpreted by the decision maker as a non-responsive answer and/or that the expert is not transparent in his analysis.

An expert who gives the court/tribunal the impression of being a 'hired gun' or having his own agenda rather than being an assistant to the process will have the value of his evidence significantly discounted, and there are no second chances.

## Conclusion

As a legal practitioner, the court/tribunals are your domain. As a legal practitioner in a building dispute you are the expert.

There is nothing like something out of control when you are not in control. As a lawyer you are charged with the management of the proceeding and management of an expert requires interpersonal management skills, knowledge, and decisive action. A decision maker accepting your expert's report can be very rewarding to both your client and his case.

If you are conducting the case then it calls for yourself to become an expert of sorts in the relevant field. In that regard, as a legal practitioner you should become familiar with the relevant terminology used in building disputes so that you can effectively communicate with your expert and if conducting the case as an advocate be able to effectively cross-examine opposing experts and witnesses.