

## The roles and duties of an expert witness in adjudication

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Adjudication is a growing process whereby the parties refer their disputes to a person who provides a decision within a relatively short period of time. This decision is only temporary and can be challenged in arbitration when the project is completed. Trett Consulting's Alastair Farr discusses the role of the Expert Witness in Adjudication procedures (text taken from the *Trett Digest*, Issue 32, 2006).

### Introduction

The UK has statutory adjudication provisions and in the eight years since the Housing Grants, Construction & Regeneration Act 1996 (the 'Adjudication' act) came into force, the size and complexity of disputes being referred to adjudication has increased. At the same time there has been a growing tendency for party representatives to use techniques in adjudication that one would usually expect to find in arbitration or litigation. For example, it is common to see the use of witness statements and sealed offers. Additionally, 'expert' reports are also being used (for example, to support quantum and extension of time claims and cases involving breach of professional standards.

Before considering the role and duties of an 'expert witness' in adjudication, I would like to quickly recap on these elements as they manifest themselves in both litigation and arbitration proceedings.

### Expert Witnesses in Litigation and Arbitration

In litigation, the duties of an expert are codified in Part 35 (Experts and Assessors) of the Civil Procedure Rules. Further guidance is given in Practice Direction PD35 and, in June 2005, the Protocol for the Instruction of Experts was issued as an Annex to Part 35. The aim of the Protocol was to offer guidance to experts, and those instructing them, in the interpretation of Part 35. It sets standards to be followed for the use of experts, for the conduct of the experts, and for those who instruct them. An expert must also comply with the standards required by his or her own profession. The Academy of Experts (the largest body of expert witnesses in the UK) also has its own 'Code of Practice for Experts' which sets out the minimum standards to be adhered to by its members.

In arbitration, the duties of an expert are not governed by CPR rule 35 per se, but in practice these rules are often used as guidance. Fundamental principles such as the requirement for independence are all observed, as are the relevant professional codes and standards. Above all, the expert's duty is to the tribunal and not to the instructing party.

The duties and standards of an expert are very important and are taken very seriously by the courts. Recent case law has highlighted instances where professional standards have fallen below those expected by the courts. See, for example, the cases of *Skanska -v- Eggar*, where the court considered the extent to which an expert had contributed to his own report, and *Great Eastern Hotel -v- Laing*, where the court considered the impartiality of an expert.

In practice, the use of an expert can be invaluable, particularly when there are complex technical, causation, or quantum issues. The court or tribunal can be greatly assisted by an expert, such that many issues of fact or quantum can be agreed between the experts before the case even reaches trial.

How then, does the use of an expert witness in adjudication proceedings compare?

### Expert Witnesses in Adjudication Proceedings

What duties are owed and what standards are expected?

CPR35, PD35 and the new Protocol do not apply to adjudication, and the HGCR 1996, the Scheme, and standard form adjudication procedures such as the JCT Standard Form of Building Contract's Adjudication Rules, do not expressly provide for party appointed experts. Therefore, the duties of an expert, in either submitting a report or giving evidence or being questioned by the Adjudicator at the hearing are not expressed and are certainly not codified to the extent provided by CPR35.

In the absence of any specific rules, what duties and standards should apply? My view is that it is vital that an expert involved in adjudication retains his independence and is seen to do so at every stage of the process.

It is also important that his report makes it clear that his overriding duty is to the Adjudicator, above that of the party instructing him. To the extent they are relevant, he should act in accordance with the main principles set out in CPR35. He should also comply with his own professional standards and with the requirements and membership rules of professional institutions such as the Academy of Experts, if applicable. The party instructing an expert should also seek to comply with similar procedures to those laid down in CPR35 and be mindful of the duties expected of an expert in arbitration or litigation during the course of the adjudication.

#### Is the procedure suitable for adjudication?

In practice, adjudication usually involves the submission of a Referral, followed by the Response. Replies by both parties often occur and sometimes a meeting or hearing will be held. The parties can choose to include an expert report within their submissions if they so wish. Unfortunately, however, the nature of adjudication means that the use of an expert does not always benefit the process as a whole.

#### Timescale

Unlike litigation and arbitration, the timetable in adjudication is very tight, even in substantial and complex cases. Adjudications may often be commenced without warning. There is, therefore, a risk that the Responding Party, when faced with an expert report within the Referral document, may be unable to react quickly enough and appoint its own expert, putting them at a disadvantage in the proceedings.

Adjudication does not allow the simultaneous exchange of expert reports, as would be typical in litigation or arbitration. The mechanism of Referral, Response and Reply is, in fact, the complete opposite and does not allow for the process of submitting and exchanging expert reports which help to provide a level playing field.

Neither the procedure, nor the usual timetable of adjudication, allow experts to meet in order to narrow issues and agree facts. In litigation or arbitration, the experts' meeting is often a valuable

process as it allows the experts to reach agreement on issues and facts, thus assisting the court or arbitrator and saving considerable time and cost.

### 'Testing' the evidence

Another problem is that, unless a meeting is held by the Adjudicator (which the expert could attend to give evidence if required) there is no opportunity for either the Adjudicator or the other party to test the expert evidence. In these circumstances, what weight, if any, should an Adjudicator give to an expert report?

### The expert's independence

There is a very real danger that an expert's independence, impartiality, objectivity or integrity may be impaired by the adjudication procedure itself, unless the expert and those instructing him are meticulous in underpinning the essential duties of the expert. The very fact that an expert report would typically be issued within the Referral or Reply documents may lead to the impression that the so-called 'expert' is, in fact, no more than part of one party's advocacy team.

### The Adjudicator-appointed expert

Whilst these comments have been concerned with party-appointed experts, it should be noted that the Adjudicator is permitted, under the Scheme and under most standard form Adjudication agreements, to appoint an expert of his own volition, if he so wishes. In this instance, the Adjudicator must be very careful to allow the parties the opportunity to see the expert report and to comment upon it before issuing his decision. Indeed, in the case of *Balfour Beatty v-Lambeth Borough Council* the Adjudicator used the report of an appointed expert without alerting the parties as to his proposed methodology and his decision was not enforced.

### Conclusion

In summary, my view is that adjudication can bring into conflict the fundamental duties of an expert. The use of an expert in adjudication should be approached very carefully and with due recognition of these duties. Care needs to be taken by both the expert and those instructing him to ensure that the common standards of CPR35, PD35 and the Protocol (so far as they are analogous) are adhered to.

A final thought worth considering: if a dispute is so complex as to require the appointment of an expert, does this not suggest that litigation or arbitration should be considered as more realistic and practicable alternatives?