THE ROLE OF THE SURVEYOR-EXPERT AND THEIR EVIDENCE IN LITIGATION

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Introduction

1. This article considers how the duties imposed on expert witnesses impact upon the functions of expert surveyors giving valuation evidence tendered in Court and in the Upper Tribunal. We will refer to all tribunals as "the Court" by way of shorthand.

2. Surveyors are often encountered giving expert valuation evidence in litigation. The evidence is *opinion* evidence (though factual evidence can also be given), rooted in the *expertise* that the expert demonstrably holds, of what an expert *genuinely thinks* would happen in relation to the issues on which their opinion is sought. The role of an expert is critical because the expert is assumed by the Court to be giving to the Court the honest assistance it needs to come to a correct conclusion. The reason why breaches of expert duties are taken so seriously is that it undermines the Court's trust in the opinion evidence tendered, and risks the Court reaching an unfair outcome.

3. It is the giving of opinion evidence – of what in the expert's view something is – that distinguishes the expert from a factual witness. The Court is being invited to accept the expert's opinion to resolve the case. That is not to say that the Court must accept expert evidence – it plainly need not do so – but it will be greatly assisted by it. What differentiates experts from advocates is that, subject to their duties, advocates are openly putting their client's case. They are, within their rules of conduct, known to be partisan. That is something that an expert giving evidence cannot be.

4. The RICS has published a lengthy but important guide, *Surveyors Acting as Expert Witnesses* (effective April 2014), which can be consulted online. An updated edition is expected imminently. Lord Neuberger of Abbotsbury, the retired President of the Supreme Court, and cross-examiner of countless valuers during his career at the Bar, explains the crucial role of experts in the foreword. An expert giving evidence in Court is directed to the stringent requirements of the CPR, Part 35. The Upper Tribunal (Lands Chamber) website contains the rules and practice direction for that Tribunal, which

mirrors the CPR in most but not all respects. Specific attention is drawn to the statements concerning conditional fees and so on in the Practice Direction.

5. Any expert proposing to give opinion evidence to a Court or Tribunal must be familiar with and adhere to all of those principles.

6. The increased focus on expert evidence may be illustrated by the new expert's statement of truth in PD35, paragraph 3.3, applicable to Court proceedings. The passage in bold, the addition of which was evidently felt necessary, is new:

   "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. **I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth**"

The Status of the Expert

7. The use of experts is only with the permission of the Court, and then only so far as necessary for the resolutions of identified issues requiring expertise. Valuation is one such issue where usually each side generally calls its own expert.

8. In determining whether the question is one of expertise, and whether the witness is an expert, guidance may be taken from the Australian case of *R v Bonython* (1984) 38 SASR 45, King CJ said at pp. 46 – 47:

   "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses Page 14 possessing special knowledge or experience in the

area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

9. If the matter is one on which the judge (or jury, where there is one) can form their own views, then an expert is not necessary: se *R v Turner* [1975] Q.B. 834.

10. CPR 35.3 clearly states:

    (1) It is the duty of experts to help the court on matters within their expertise.

    (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

11. The role of an expert and their evidence is well-described in *Neurim Pharmaceuticals v Generics UK Ltd* [2020] EWHC 3270 (Pat), by Marcus Smith J:

    (i) An expert is responsible for his or her evidence, including the precise wording of any report submitted to the court under the name of that expert. In many cases, the expert will be in need of, and will receive, assistance from the solicitors (or other lawyers) who have retained that expert. That is entirely understandable, but only serves to enhance the importance of the expert being entirely satisfied that his or her opinion is properly reflected in the report(s) submitted in that expert's name. This is the duty of the expert, and it is not one that can be delegated.

    (ii) An expert will be giving opinion evidence in relation to a subject-matter with which a lay person – specifically, in this case, the judge – will be unfamiliar. That is why the evidence is needed. It is incumbent on the expert not merely to present evidence that is technically correct, but that makes a fair presentation of the expert's opinion. If the expert does not do that, then criticism is liable to follow.

12. The expert's role is therefore to fill a gap in the Court's understanding. However, they are also permitted in Tribunals, were generally there is a valuer member sitting in a judicial role along with the legal panel member. Therefore, in the Upper Tribunal, the

expert valuers called by the parties are under a double scrutiny – from experienced judges used to seeing experts cross-examined and familiar with valuation, but also from members of their own profession, in the same fields of expertise.

The Ingredients of an Expert's Opinion

13. An expert is there to assist the Court in reaching its decision in relation to a matter that requires the input of a qualified witness. The question then is, what sorts of things does the Court need assistance with, and how is it to be assisted?

14. In CPR Practice Direction 35, it is stated that:

> 2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
> 2.3 Experts should consider all material facts, including those which might detract from their opinions.
> 2.4 Experts should make it clear –
> (a) when a question or issue falls outside their expertise; and
> (b) when they are not able to reach a definite opinion, for example because they have insufficient information.
> 2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

Trap Number One: Questions of Law and Questions of Fact

15. The Court does not need assistance from an expert on questions of law (unless it is foreign law) and questions of fact. It is perfectly able to deal with those.

16. An expert's view on the law, or an expert's view of how questions of fact should be determined, is not merely unhelpful to the Court, but amounts to a usurpation of the function of the Court. As the Privy Council explained in *Pora v R* [2015] UKPC 9:

> It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case

17. If, as it often the case,

    a. a matter of fact (e.g. has an improvement been carried out by the tenant), or
    b. a matter of law (e.g. what does the term of a lease mean, or what is the meaning and effect of a valuation assumption which the valuer is directed to apply),

    is controversial between the parties, and remains unresolved at the point at which the expert is being asked to express an opinion, then it would be most unwise for the expert to write a report (as is encountered surprisingly often) on the basis those issues will be resolved in favour of the party who is calling the expert. This is for two reasons: first, it means that if the Court decides those points the other way, then the report has not dealt with that eventuality at all, and, secondly, it lays the expert open to the criticism that they have not acted impartially. “An expert should not assume the role of an advocate”: RICS Guidance, paragraph 5.2.

18. The right approach in such a case is to produce a report which considers the valuation effects of the alternative cases being put by the parties to cover all of the ground fairly.

Trap Number Two: Data Collection

19. Valuation experts have a function that is a little peculiar, in that they are involved in data gathering. A valuation expert who is being asked to value a hypothetical transaction on various assumptions (and perhaps on alternative assumptions if there is a controversy between the parties) has to do so by references to the closest real-world analogues to that transaction that they can find.

20. This stage is the second stage at which a valuation expert can come a cropper. An entire report can be tainted if the sample of transactions is not representative of the market as a it operates in the real world. An expert may not take an adequate sample of

comparables, limiting themselves, perhaps, to the contents of their filing cabinet, or the filing cabinet of professional acquaintances. That can lead to inaccurate sampling and skewed evidence, a problem that is particularly prevalent in litigation under the Electronic Communications Code and not confined to any particular side. An expert who is giving evidence should be prepared to explain what steps they have taken to gather evidence, who was approached and why. This instils confidence that the expert has undertaken an investigation free from preconceptions. Experts ought not to delegate the function of obtaining comparables to someone else, or confine themselves to a "go to" batch of comparables that they deploy in "real world" negotiations.

21. Not to undertake the above step is dangerous. A confirmation bias might prompt an expert to disregard transactions that produce too high or too low a result for the client. The same unconscious bias may mean that the expert does not refer or disclose to the other side the existence of such a comparable, or that they do not disclose some particular feature of the transaction that explains why it is atypical. As the Guidance explains, "your duty to the tribunal is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour your client".

Trap Number Three: Data Processing

22. Once comparables are gathered, a number of things need to be looked at:
    a. Is the transaction comparable? This breaks down into a number of issues:
        i. What is the nature of the transaction? Is it an open market transaction, or a renewal of an agreement, or a settlement, or a judicial determination? Does reliance need to be placed on non-open market transactions, and, if so, can adjustments be made?
        ii. Are there any special features of the transaction (such as that it included incentive payments, or that there was particular pressure to get it done, or that it forms part of a broader set of transaction) that need to be accounted for, and, if so, can the transaction be adjusted accordingly? If not, can the comparable be used?
        iii. Is the date of the transaction such that it is too old, or falls before a relevant legislative change?

iv. Are there relevant features – terms, or features of the property – that require adjustments to render the transaction truly comparable?
v. Have all adjustments been appropriately identified and explained in each case?

b. Once those comparables have been obtained, and once the most relevant have been identified (and the Upper Tribunals' standard directions are now that ten are sufficient) then it is sensible for the expert to make enquiries of both sides as to how the transaction came to be, and, if possible, to obtain an agreed transaction sheet signed by both agents. Again, a tenant's agent obtaining only an email from a tenant's agent for a particular transaction is not, for obvious reasons, as good as a tenant's expert obtaining the landlord's confirmation of the background to that transaction.
c. It will be sensible for the experts on both sides to meet and discuss the comparables, and agree a list of agreed comparables and reasons for not agreeing others.

23. The gathering, selection and treatment of comparables needs to be explained in the Report, because it will be asked about in cross-examination. Such explanations are important:

a. An unconvincing table of comparables will open up the expert to the charge of being selective;
b. An unexplained adjustment in favour of the party calling the expert who has made it will excite interest.

24. If two experts cannot agree on whether a comparable is relevant, or how it is to be analysed, that will reveal something about their approaches and furnish material that allows submissions to be made on the quality and impartiality of the opinions provided to the Court. If the Court in question is in fact the Upper Tribunal, with its own valuer member, those observations may not wait until closing submissions.

Trap Number Four: The Limits of Expertise

25. Experts need to take care not to trespass in areas outside of their expertise. An expert on valuation is not, for instance, being asked to give the Court the benefit of their views

about the reasonableness or otherwise of a particular term that is in dispute between the parties. This is particularly so where the basis for disputing such a term is either not a question of expert evidence at all, but, perhaps, a matter of law as to what is reasonable in the circumstances, or a matter of expertise that is not within the competence of the expert (such as the technical or health and safety ramifications of a particular land use).

The Report

26. CPR PD35 sets out the requirements for a CPR-compliant expert report:

3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

3.2 An expert's report must:

(1) give details of the expert's qualifications;

(2) give details of any literature or other material which has been relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;

(4) make clear which of the facts stated in the report are within the expert's own knowledge;

(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give an opinion without qualification, state the qualification; and

(9) contain a statement that the expert –

(a) understands their duty to the court, and has complied with that duty; and

(b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

3.3 An expert's report must be verified by a statement of truth in the following form –

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Part 22 deals with statements of truth. Rule 32.14 sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.)

The Effect of Non-Compliance

27. There have been several recent cases concerning the effect of non-compliance with the general principles and the specific rules applicable to the Court in question.

28. At the lowest end of the scale of consequences is, of course, that the evidence of the expert is not taken into account at all, with the effect that that part of the party's case is not believed. That can result in the loss of the case, and in adverse costs orders.

29. It has also been held by the Supreme Court that tainted expert evidence may be inadmissible: *Kennedy v Cordia* [2016] UKSC 6; the same is true of England and Wales: *Toth v Jarman* [2006] EWCA Civ 1028; [2006] 4 All ER 1276; *Field v Leeds City Council* [2000] 1 EGLR 54; *Senova Ltd v Sykes (VO)* (RATING - EXEMPTION) [2019] UKUT 275 (LC).

30. Moving to the more serious end of the scale, an infringement of the principles contained in the civil procedure rules can lead to prosecution for contempt of court, as the newly revised declaration in the CPR shows. If, for instance, an undisclosed condition fee comes to light, then the expert may find themselves referred to their relevant supervisory body by the Court for regulatory attention, in addition to any of the consequences set out above: *Gardiner & Theobald LLP v Jackson (VO)* (RATING – procedure) [2018] UKUT 253 (LC); *Merlin Entertainments Group Ltd v Cox (VO)* [2018] UKUT 406 (LC).

31. Finally, it is to be remembered that the partial immunity from suit in negligence for expert witnesses giving Court evidence has been removed by *Jones v Kaney* [2011] UKSC 13. If the evidence is negligently tainted (for example if it is over-egged

Conclusion

32. As ought to be clear from the cases and the various rules attached to expert evidence in Court, the expert faces stringent standards. The rationale for expert evidence is to help the Court reach its decision. The Court in turn depends on the expert for that help, and has to be confident that the expert evidence is reliable. Unreliable, or tainted, expert evidence is therefore particularly serious.

33. Given that, the role of the expert can be difficult, given that where each side calls their own expert, each expert will be given instructions and information from their own side. That will inevitably create a psychological "pull" in the direction of the client. That pull may be even stronger if the expert in their "day job" seek to negotiate the best possibly deals for the sorts of clients that they are giving evidence for in Court. As the cases show, none of that disqualifies the expert from stating their opinion, provided that a clean breast is made of such matters in the report. However, the cases also show that it is essential that the expert reminds themselves, and their client and advisers, that, although the expert is sitting on their client's side of the Court, the expert is not part of the client's "team". If the expert is discharging their functions as required by the Court, the only side that the expert should be on is that of the Court.

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