Property experts: the key to victory?

Andrew Francis provides a masterclass on how best to deploy an expert witness in a property dispute

IN BRIEF

- How to go about appointing an expert for a real property dispute, eg those relating to boundaries, easements, or restrictive covenants.
- How to instruct the expert once they have been appointed, and how to use them most effectively.
- The duties and expectations of the expert.

This article considers a problem which the author (and it is believed others) frequently encounter when expert evidence is required in real property disputes. Its emphasis will be on the practical issues raised where the context of the dispute is one of either boundaries, easements, or restrictive covenants. The specific focus will be on:

a) how to appoint an expert;
b) what questions to ask when considering the appointment;
c) what the terms of appointment must cover; and
d) what the expert must do before, at and after the appointment stage.

It might be thought while reading this article that much of it is too obvious to state. But what follows is drawn from the author's professional experience. Its purpose is guidance where good practice can easily be overlooked.

This article will assume that there will be compliance with the CPR and Practice Directions (PD) (eg CPR 35) in court litigation, and the rules and PDs which apply in the Upper Tribunal (Lands Chamber) (UTLC) and in the First-tier Tribunal (FTT). These govern the way in which expert evidence is to be admitted, managed and given. This article will also assume that any expert appointed will comply with the guidance published by the body of which the expert is a member; eg the Royal Institution of Chartered Surveyors, the Royal Town Planning Institute and the Royal Institute of British Architects. Finally, underlying this article is the fundamental principle that:

(i) experts owe a duty to assist the court or tribunal on the matters within their expertise;
(ii) that duty overrides any obligation to the appointing or paying persons; and
(iii) that the opinions expressed must be objective and unbiased and within the expertise of that expert; see for example CPR 35.3, PD 35 para 2 and UTLC Procedure Rules (UTLCPR) r 17 and UTLCPD para 18.

It is mandatory for any expert instructed to read and take the said principle on board fully, and in particular when writing any report. Quite apart from what may be within the expert's field of expertise, experience shows that evidence given by some experts (whether in reports or in live evidence) strays well outside compliance with those rules. A partisan approach may impress the appointing party, but it will damage their case and be exposed in the court or tribunal, with adverse findings from the Bench. A partisan approach when displayed in alternative dispute resolution (ADR) is also unprofessional. ADR has a role where game-playing and automatic hostility to any form of contrary evidence or reasoning have no place.

With these introductory comments, we move to consider the four stages when getting the expert and the evidence 'right' is crucial. These stages are:

1. Who do I appoint?
2. How should I instruct the expert once appointed?
3. What should the expert do when instructed?
4. How the expert can lead to victory (or defeat) at the hearing.

Each stage will be considered by reference to two examples. The first example is a boundary dispute where there is a reference to the FTT under s 73(7) of the Land Registration Act 2002 (LRA 2002) to rectify the register; 'the boundary dispute'. The second is an application in the UTLC to modify a covenant under s 84(1) of the Law of Property Act (LPA 1925); 'the modification application'.

Who do I choose? What can go wrong & how to get it right

Appointing the wrong expert is a good way for a case to go badly from the start. To avoid this, the selection process is key. It is a shame that in many cases this goes wrong. The client or the adviser says that X is 'good' and subject to scrutiny of Y and Z, a decision is often based on cost. Why choose an expert by a less rigorous process than selecting counsel? X may have been the star in an earlier case. But are they right in *this* one? How long ago was this previous case? In the boundary dispute, while X may be a first-class expert on OS mapping, is this a case where a land surveyor who is an expert on measurements would be preferable? In the modification application, do we choose A who has been in a number of recent contested applications, or

do we choose B who may have less experience in that respect, but who knows the special characteristics of the Garden Suburb where the application site is located? A and B can of course consult local agents and disclose that research and supply comparables derived from those sources. But A might have the edge as they will have had 'battle experience' in the UTLC which, as a specialist tribunal and with highly experienced judges and members, counts for a lot. A reading of the decisions of the UTLC over the past five years to see who the experts were and what was said about them is a good start.

Finally, consider whether you need another expert; eg on building conservation or farming practice. It is assumed that permission will be given for more than one expert. The same selection process applies to cases where a single joint expert can appear; eg on the technical data in a right of light dispute.

The moral at the first stage is to apply rigour to the selection process. It is not just a question of price. *Always ask counsel instructed to express a view.* Do not just rely on CVs. All of this is obvious, so why this stage is mismanaged is a mystery to the author.

How should I instruct the expert?

The short answer is, with care. This may be obvious and true, but there are three common failings which, when inverted, show how to do it correctly. First, not instructing the expert fully. Second, failing to give the expert all the core information. Finally, asking the expert the wrong questions.

As to the first error and despite the terms of the rules, PDs and professional guides, clients and advisers often do not take enough care in preparing the instructions to the expert. This includes the letter of instructions, which eventually will be part of the expert's report: see CPR 35 PD paras 3.3(3) and 5, where the latter deals with the effect of inaccurate or incomplete instructions and cross-examination which may follow. If counsel is instructed, they must be asked to advise on that letter. For an example where the inadequate nature of the instructions to the objectors' expert was exposed by cross-examination at the trial of a modification application, see *Moskofian v Foster and others* [2021] UKUT 214 (LC). Never give instructions which are partisan, or non-objective. An expert will usually decline to act on such terms: see *Briant v Baldacchino* [2020] UKUT 206 (LC), where the partisan instructions to the objector's expert led to his report not being objective or independent.

The second error is avoided by supplying the right information with care. There are three golden rules. First identify the core information; counsel will assist. For example, set out the current text of the material legislation; eg those parts of s 84, LPA 1925 which apply. Direct the expert to each question which arises under that provision and on which the expert evidence is requested; eg under s 84(aa) and s 84(1A)(a) or under s 84(1)(i) or (ii). Second, do not swamp the expert with materials which are often irrelevant to the task. Thus, in the boundary dispute, the planning evidence which has led to the dispute may be irrelevant. But in the modification application it will be relevant and within the mandatory terms of s 84(1B), LPA 1925; a provision frequently overlooked. Finally, have a system to regulate emails to the expert. Ensure they are not on every CC list. Give the expert time to consider the task.

The final error (asking the expert the wrong question) ought to be avoided by defining the issues on which expert evidence is required. Counsel should be asked to define these. In the boundary dispute, the questions may be about the age of features, what is shown in OS plans, or distances. In the modification application, the right questions will relate to the grounds relied on (eg ground (aa) in s 84(1), LPA 1925 but *only on grounds relied on* and must relate to valuation evidence (for a chartered valuer) or on the town planning implications (for a planning consultant)). Those questions must not relate to questions for the tribunal to decide; eg on discretion under s 84, LPA 1925, or whether to rectify the register under Sch 4, para 3, LRA 2002.

What should the expert do when instructed?

As with the second stage, three things often go wrong and, when inverted, show how the expert ought to proceed. First, a failure to read the instructions and materials with them fully; fortunately rare, and cross-examination will reveal this. Do not overlook the legislative terms which call for the expert's evidence and do not *précis* them in the report; eg the provisions as to compensation under s 84(1)(i) and (ii). Set them out fully and accurately. Second, a failure to understand the questions asked and to go off on a frolic on other matters; see *Cosmichome Ltd v Southampton City Council* [2013] EWHC 1378 (Ch) for an example of this. Finally, failing to visit the site and inspect from all parties' land and buildings at an early stage and certainly before drafting any report or advising the appointing counsel. Go with counsel and any other experts. While this failure may be unheard of in a boundary dispute, in modification applications, not to inspect your client's land with the proposed development in mind and not to ask for inspection of the other party's land and buildings and carry that out is a bad error (refusal to allow inspection is worse, and the court or tribunal will order access to inspect, often with costs consequences).

Another aspect of good practice between experts is to readily admit matters which can be agreed; eg present capital values in a modification application, or the limits of OS mapping or flight plan photos in a boundary dispute. Assist the tribunal by pegging out, using poles for heights and (with care) use computer-aided design (CAD) super-impositions. Leave matters to the court or tribunal which are within its domain. Leave the law to the lawyers and the courts. It is not for the expert to say if something is 'injunctable'.

Finally, *details really do matter*, especially with plans and elevations. Work from the original scale and size versions and check this material and all revisions very carefully.

How the expert can lead to victory (or defeat)

Three short points apply. First, remember the overriding duties referred to above. Second, those duties continue to trial. If the facts or evidence change, so may the expert's conclusions; eg new historical information on the age of features on the land, or changes in rental yields. The expert *can* have second thoughts and reflect that in their evidence; see *Lamble v Buttaci and another* [2018] UKUT 175 (LC) for an example where the applicant's expert was commended for this by the tribunal. Third, ask for the trial bundles and read them well before the trial. There may be materials in there which may be used in cross-examination of the expert, for which foreknowledge is vital. Counsel and solicitors will have a vital role to play in identifying vulnerable points of evidence. It is obvious that this applies in particular to the close study of the expert evidence for the other party.

A final point

The key to using an expert *effectively* is teamwork. As with other points made above, this is obvious and true. But in too many cases teamwork can fail where the expert's instructions are left to the last minute, where the expert is not sent the right materials, or where clients will not invest in trial preparation such as CAD drawings or proper plans. As a general rule, it is teamwork which 'does it', and the expert is a vital part of that team. To ignore that rule makes it more likely that the case will be lost. To observe it ought to lead to victory, or at least the feeling that the case, even if lost, was run as well as it could be. NLJ

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