

The Expert Witness in Construction Disputes

Michael P. Reynolds

MSc(Lond), LL.M(Lond), FCI Arb

Solicitor and Chartered Arbitrator



**Blackwell
Science**

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For Rosemary, John and Francis

Contents

<i>Preface to Third Edition</i>	<i>xi</i>
<i>New Terminology</i>	<i>xii</i>
<i>Glossary</i>	<i>xiv</i>
Chapter 1: The Expert Witness: Role and Duties	1
1.1 Definition	1
1.2 Why experts are needed	1
1.3 Overriding duty	2
1.4 Ethics and professional integrity	5
1.5 Becoming an expert witness	7
1.6 Appointment of the expert	10
1.7 The expert's duties to the client	12
1.8 The expert's role outside the court/arbitration system	21
1.9 Qualities of an expert witness	22
Chapter 2: Contracts, Claims and Damages	24
2.1 General	24
2.2 Contract claims	24
2.3 Damages	30
2.4 Breach of statutory duty	33
2.5 Law of negligence	35
Chapter 3: Professional Liability and the Expert Witness	41
3.1 The expert's role	41
3.2 Contractual liability	41
3.3 Non-contractual liability	43
3.4 Advising on breach of duty by professionals	43
3.5 The expert's own professional liability	49
Chapter 4: How the Courts Evaluate Expert Evidence	54
4.1 The overriding objective	54
4.2 Illustrative cases	57
4.3 The importance of demeanour in court	65
4.4 Whether the court has to accept the expert's opinion	67
4.5 Summary	71
Chapter 5: Formulation of the issues	72
5.1 The initial stages	72
5.2 Statement of case	75

5.3	Site investigations	76
5.4	Summary	78
Chapter 6: Procedures for Resolution of Disputes		79
6.1	Changes to the English adversarial system	79
6.2	Statutory adjudication under the 1996 Act	85
6.3	Arbitration	89
6.4	Litigation	96
6.5	Alternative dispute resolution	101
6.6	Conclusion	105
Chapter 7: Experts' Discussions and the Single Joint Expert		106
7.1	Experts' discussions	106
7.2	The single joint expert	111
7.3	A case report on experts' meetings	112
Chapter 8: Evidence and the Expert		115
8.1	Facts in issue	115
8.2	Types of evidence	117
8.3	The expert's evidence	119
8.4	Hearsay evidence	122
8.5	Admissibility	123
8.6	Proof	125
8.7	A checklist on points of evidence	127
Chapter 9: Disclosure		128
9.1	What is 'disclosure'?	128
9.2	Assisting with disclosure	130
9.3	Privilege	131
9.4	Costs considerations	136
9.5	Practicalities	137
9.6	Conclusion	140
Chapter 10: Preparation of Scott Schedules		142
10.1	Objective	142
10.2	What type of schedule?	143
10.3	The expert's role	146
10.4	Information technology (IT)	147
10.5	Checklist for preparing a Scott Schedule	148
Chapter 11: The Final Report and Trial		149
11.1	Status of the final report	149
11.2	Contents of the final report	151
11.3	Report for the claimant	153
11.4	Report for the defendant	156
11.5	Conflicting duties	157
11.6	Presentation of the final report	158

11.7	Trial preparation	158
11.8	Procedure at trial	159
11.9	Checklist for the trial	163
Chapter 12: 'Che sera sera'		165
12.1	The expert and civil justice reformation	165
12.2	Truth and justice	168
Appendix I: Expert Witness Institute Model Terms		171
Appendix II: Practice Direction 49C - Technology and Construction Court		175
Appendix III: The TeCSA Expert Witness Protocol		179
Appendix IV: Pre-action Protocol for Construction and Engineering Disputes		185
Appendix V: Civil Procedure Rules Part 35 - Experts and Assessors		190
Appendix VI: Draft Code of Guidance for Experts Under the Civil Procedure Rules 1999		194
Appendix VII: The <i>Cala Homes</i> case and the partisan expert		199
Appendix VIII: The Expert Witness Institute Model Terms and Conditions		202
<i>Bibliography</i>		205
<i>Table of Cases</i>		206
<i>Table of Statutes</i>		211
<i>Table of Statutory Instruments</i>		212
<i>Rules of the Supreme Court</i>		212
<i>Table of Civil Procedure Rules</i>		212
<i>Index</i>		214

Preface to Third Edition

Of all aspects of civil justice outside the work of the legal profession, none is perhaps more important, difficult or demanding than that of the expert witness. Very often he or she is expected to be knowledgeable not only of the science he represents but also of legal procedures with which he may be concerned. Although the task is an onerous one, it is not one that can be carried out in isolation to practising one's profession. The expert must be an experienced practising professional as well as an expert.

Certain qualities are therefore required, as well as particular professional qualifications and experience, so that only a very small percentage of practising professionals may be eligible for the task. To deal with this daunting task this book covers the basic duties and tasks of the expert in the context of the Civil Procedure Rules 1998 applicable to construction cases, drawing on material I produced for the first two editions of *The Expert Witness and his Evidence*.

The expert witness in the new millenium is expected to be a different type of expert to his or her predecessors. He or she now owes an overriding statutory duty to the court, with the nature of the principal duties having been more clearly set out in the CPR and by Mr Justice Cresswell in *National Justice Compania Naviera SA v. Prudential Assurance Co Limited (The 'Ikarian Reefer')*. Not only that but the support must be conversant with the emerging ADR process and adjudication.

This edition therefore focuses on the important practical aspects of the expert's modern role such as his duties to the court and his client; and the distinction between the expert as an adviser and as an expert witness and considers the legal significance of that in terms of the Civil Procedure Rules and the law of privilege. Consideration is also given to the presentation of written and oral evidence before the court, the role of the single joint expert, the contents of an expert's report and his role in facilitating resolution of the technical issues in meetings and discussions.

As with the production of previous editions of this book I am grateful to Julia Burden of Blackwells for her encouragement and professionalism and to Tamsin Bacchus for her unstinting efforts in producing a more readable and logical text and format.

Michael P. Reynolds

New Terminology

Schedule of New Terminology under the Civil Procedure Rules

Old term	New term
action	claim
<i>Anton Piller</i> order	search order
assessment (of costs)	summary assessment
<i>Calderbank</i> letter (or offer)	Part 36 offer
close of pleadings	(no equivalent)
costs in the cause	costs in the case
counterclaim	a counterclaim is a Part 20 claim but the term 'counterclaim' is also still in use
discovery	disclosure
<i>ex parte</i>	without notice (to other parties)
guardian <i>ad litem</i>	litigation friend
in camera	in private
in open court	in public
<i>inter partes</i> hearing	hearing with notice (or hearing on notice) (to other parties)
interlocutory	interim
interlocutory judgment for damages to be assessed	judgment for an amount to be decided by the court
interrogatory	request for further information
leave	permission
<i>Mareva</i> injunction (or order)	freezing injunction
motion (in Chancery)	judge's application
motions day (in Chancery)	applications day
next friend	litigation friend
originating application	Part 8 claim form (but originating applications are still used in insolvency proceedings)
originating summons	Part 8 claim form
plaintiff	claimant
pleading	statement of case
rebutter	(no equivalent)
rejoinder	(no equivalent)
request for further and better particulars	request for further information

Old term	New term
schedule of special damages	schedule of past and future loss and expense
setting down (for trial)	listing (for trial)
small claims arbitration	small claims track
specific discovery	specific disclosure
statement of claim	particulars of claim
<i>subpoena</i>	witness summons
substituted service	alternative service
summons for directions	case management conference
summons (for interim application)	application notice
summons (to commence	claim form
proceedings in a county court)	
Supreme Court Taxing Office	Supreme Court Costs Office
surrebutter	(no equivalent)
surrejoinder	(no equivalent)
taxation (of costs)	detailed assessment
taxing master	costs judge
third party	Part 20 defendant
third-party proceedings	Part 20 claim
writ (to commence proceedings	claim form (writs are still used in
in High Court)	execution of judgments)

Glossary

AFFIDAVIT

A written statement of fact affirmed or sworn by a deponent on matters within his knowledge or belief.

ARBITRATION

The determination of a dispute or difference between two or more parties by an agreed or nominated arbitrator.

ARBITRATOR

A person or persons appointed by agreement between the parties to a dispute to resolve matters in issue between them.

ASSESSMENT OF COSTS

If the unsuccessful party does not agree the successful party's costs, he may require the successful party to have his bill of costs assessed by a master of the High Court.

AWARD

A final judgment upon which all matters referred to the arbitrator are determined unless the agreement for arbitration expressly provides otherwise.

CLAIM

A proceeding by which one party seeks to enforce some right against another party, or to restrain the commission of some wrong by another party against that party. It is usually commenced by a form prescribed by the rules of court.

CLAIMANT

The party making a claim.

DEFENDANT

A party who defends the action.

DIRECTIONS

Orders given by the judge or arbitrator for the conduct of the proceedings.

DISCLOSURE

A process by which the parties to a claim are required to disclose all material documents in their possession.

INJUNCTION

An equitable remedy whereby a person is ordered to refrain from doing, or is ordered to do, a particular act or thing.

INTERIM APPLICATION

Proceedings which take place between the commencement of the action and the trial, or between the service of notice to concur in the appointment of an arbitrator and the hearing.

LIQUIDATED AND ASCERTAINED DAMAGES

A fixed amount of damages agreed by the parties to a contract prior to the execution thereof.

PART 36 OFFERS

A Part 36 offer with a payment into court is usually made by a defendant who has no defence or limited defence to an action. It is a tactical process whereby the plaintiff may be put at risk as to costs if he continues with the action and does not obtain a judgment in excess of the amount of the payment in. The plaintiff can likewise give formal notice of a figure at which they would agree settlement.

PLEADINGS

Written statements of fact containing the respective parties' cases. They comprise such documents as statement of claim, defence, counter claim, defence to counterclaim, and reply.

POINTS OF CLAIM

The claimant's pleading which sets out the facts upon which he will rely to prove his case in an arbitration.

PRIVILEGE

A right not to disclose certain classes of documents or communications, e.g. legal advice.

RESPONDENT

The person who defends the arbitration.

SEALED OFFER

The equivalent of a Part 36 offer in an arbitration. The practice of sending the arbitrator a sealed envelope containing an offer. The arbitrator is directed not to open the sealed envelope until he has made his award.

In practice, to avoid any possible insinuation that the arbitrator may have been influenced by the knowledge that a sealed offer has been made before he has made any substantive award, he will direct the respondents to hand him an envelope which contains any such offer *or* a statement that no such offer has been made, before the opening of proceedings. This contrivance is unnecessary for Part 36 offers (*supra*)

where the court remains in ignorance of the offer until after the substantive award.

STATEMENT OF CASE

The claimant's statement which sets out the facts in issue upon which he intends to rely at the trial.

TECHNOLOGY AND CONSTRUCTION COURT

Circuit judges who principally hear construction cases but who also have jurisdiction to hear matters of technical or scientific complexity.

Chapter 1

The Expert Witness: Role and Duties

1.1 Definition

The Concise Oxford Dictionary defines an expert as a person having special skill or knowledge. This book is aimed particularly at two categories:

- (1) those who are retained by a client to advise as consultant upon a matter which may subsequently become contentious; and
- (2) those who are retained by the client through solicitors to advise upon a disputed matter, and who are subsequently instructed to give expert evidence by way of a written report and/or oral evidence.

1.2 Why experts are needed

Before considering the role of the expert and whether one may be sufficiently capable of acting in that role, a basic understanding of the need and necessity is required.

From early times our courts have acknowledged that the judges needed the assistance of particularly skilled persons to understand technically complex matters outside the law. Judge Newey reminded experts of this in giving judgment in *Shell Pensions Trust Ltd v. Pell Frischmann & Partners (a firm)* (1986) where he considered the historical context of the expert's role in court from the time of the Renaissance and rebirth of science in Europe. He referred to Mr Justice Saunders admitting evidence of 'other Sciences or Faculties' (*Buckley v. Rice Thomas* (1554)). Judge Newey also referred to Lord Mansfield's judgment in *Foulkes v. Chadd* (1782) where he confirmed that the courts would recognise 'the Opinion of Scientific men upon proven facts may be given by men of Science within their own science'.

Since then the courts have come to recognise the role of the expert witness 'to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'. *Davie v. Edinburgh Magistrates* (1953).

In other words, the fundamental function of the expert is to assist the court by explaining technical/scientific matters so that the court fully understands the essential facts and matters in issue. This essential role should be seen in context – the expert is simply a witness, although in a special category and his particular skill and expertise may be persuasive.

1.3 Overriding duty

Changing emphasis

In the past the role of the expert witness has been viewed with some scepticism as expressed by Sir George Jessel MR in *Lord Abinger v. Ashton* (1874)

In matters of opinion I very much distrust expert evidence for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows that he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction. A dishonest man, knowing he could not be punished, might be inclined to indulge in extravagant assertions on an occasion that required it. But that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in a sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias ... Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves the paid agents of the person who employs them.

Sir George Jessel's opinion, which reflected public perception, described the temptations before experts as the hired agent of one side. It was not, however, all the expert's fault because the expert witness had to work within the confines of the adversarial system. It is probably due to the nature of the legal system, rather than due to the relationship between the employer and the expert, that the expert was moulded into the stand taken by his client. It was also obviously because he was instructed by one side and because he only had access to one side's point of view and one side's evidence. Despite this, the expert had to rise above the temptation to be biased and look objectively at the facts and make a balanced judgment.

Such a situation was deplored by legal thinkers both in the academic field and in giving judgment in court. Lord McMillan clearly stated the ideal in one of his lectures.

Of one thing I am certain, and that is that no scientific man ought ever to become the partisan of a side; he may be the partisan of an opinion in his own science, if he honestly entertains it, but he ought never to accept a retainer to advocate in evidence a particular view merely because it is the view which it is in the interests of the party who has retained him to maintain. To do so is to prostitute science and to practise a fraud on the administration of justice.

(Lord McMillan *Law and Other Things*)

In *Whitehouse v. Jordan* (1981) Lord Wilberforce said:

It is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating.

In that case junior counsel was criticised for having drafted an expert report.

Even where the the legal team were not involved at all in the preparation of the expert report, if the expert wrote as a partisan no great weight was given to his evidence. In *Cala Homes (South) Limited v. Alfred McAlpine Homes (East) Limited* (1995) the expert had previously written an article in *Arbitration* in which he asked

How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?

Mr Justice Laddie roundly condemned this approach and concluded

In the light of the matters set out above, during the preparation of this judgment I re-read [the expert's] report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues. (For more details of the article and judgment see Appendix VII)

The problems arising from the conjunction of the need for expert evidence and the adversarial system were twofold. Firstly there was the difficulty of identifying such partisan evidence. By definition the judge is lacking the expert knowledge to draw his own inferences from the facts and, as Mr Justice Laddie said, 'In the case of expert witnesses the court is likely to lower its guard'. Secondly the costs of ranging expert against expert in the adversarial system could easily spiral out of all proportion.

In his Final Report published in July 1996, Lord Woolf noted that no-one seriously challenged his contention that the two major generators of unnecessary cost in civil litigation were uncontrolled discovery and expert evidence. He further noted that a large litigation support industry generating a multi-million pound fee income had grown up amongst certain professions.

Such a development compounded the difficulties encountered by the courts in dealing with a system which tended to invite complex and unnecessary satellite litigation. Such a system was clearly against all principles of proportionality and access to justice. The court's role in case management has been strengthened in order to ensure that the parties are on an equal footing, that expense is saved, that cases are dealt with expeditiously and fairly and that the courts allot an appropriate share of their resources, taking into account resources required for other cases.

The admission of expert evidence is now restricted to that which is reasonably required to resolve the proceedings. Under the Rules of the Supreme Court which governed High Court proceedings before April 1999 it was generally left to the parties to offer expert evidence. Now, however, such evidence will be questioned by the court not only for relevance and admissibility but also for reasons of cost. Most important of all the expert now owes an overriding duty to the court which underlines the need for experts to be independent and impartial. At the start of Part 35 on Experts and Assessors the new Civil Procedure Rules (CPR) state:

- 35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

The CPR also encourage the instruction of a single joint expert where possible. This is not so much to encourage court experts but an effort to save time and cost. In smaller range cases on the 'fast track' (i.e. small or simple claims) outside the jurisdiction of the Technology and Construction Court (as the Official Referees have been renamed) this may be feasible.

Expert not an advocate

The role of the expert witness is fundamentally to give an opinion as to technical matters on behalf of the client in as impartial and independent a fashion as is reasonably necessary for him to do.

The role of the advocate is to represent the client and to argue matters of law as necessary. The role of the expert is not concerned directly with matters of law; he does not argue matters of law, he gives views on matters of technical expertise. Inevitably, because of the expert's professional discipline, he is not trained as an advocate. He has not spent his professional career in the courts or before judges or arbitrators as a barrister or professional advocate and he does not have the same depth of skill or experience in advocacy. To mix up these roles necessarily contradicts the role and function of the expert witness. As soon as the expert witness assumes the mantle of the advocate he becomes partisan and more directly involved on one side, whereas the expert witness must assume an objective and impartial role. (Although there are excepted areas in which experts may act before planning and other tribunals, e.g. rent tribunals, and in the adjudication process under the Housing Grants, Construction and Regeneration Act 1996.)

The question of an expert acting as an advocate was indirectly addressed by Mr Justice Garland in *University of Warwick v. Sir Robert McAlpine* (1988). He recalled Lord Wilberforce's words in *Whitehouse v. Jordan* (1981) (above) and also said:

In their closing speeches counsel felt it necessary to challenge not only the reliability but also the credibility of experts with unadorned attacks on

their veracity. This simply should not happen where the court is called upon to decide complex scientific technical issues. To a large extent this excessively adversarial approach to expert evidence could have been avoided if experts who had at various times expressed contrary or inconsistent views had dealt with this in their reports giving any necessary explanation. Similarly, where experts alter their views at a later stage or introduce a wholly new theory or interpretation, the new approach should be reduced to writing and furnished to the other parties at the earliest possible opportunity so that all the relevant experts can give the matter due consideration and, in a proper case, meet in order to define what is common ground and where they differ...

Mr Justice Garland generally described the role and function of the expert in the circumstances and deplored the adversarial approach.

Lord Woolf's enquiry was particularly concerned at the misuse of expert evidence and witnesses in litigation. In *Access to Justice* (1996) he expressed concern that the present system had the effect of exaggerating the adversarial role of experts which helped neither the court nor the parties. He quoted the Court of Appeal

For whatever reason, and whether consciously or unconsciously the fact is that expert witnesses instructed on behalf of parties to litigate often tend ... to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties. (*Abbey National Mortgagees Plc v Key Surveyors Nationwide Limited and Others* (1996))

Thus the new rule quoted above, that the expert's primary duty to assist the court overrides his duties to the client. This tips the balance towards a more objective and impartial role. It is important that lawyers understand and respect that role and do not encourage the old adversarial posturing but a new sense of professionalism. What may ensure the greater independence of experts is that they are no longer entirely reliant upon their clients or their solicitors. The expert may apply directly to the judge for directions under rule 35.14 without notice to any party and the court may give directions serving a copy of the same together with a copy of the expert's request.

Above all the expert's credibility depends upon the expert giving a true and honest opinion and helping the court on matters within his own expertise.

1.4 Ethics and professional integrity

Expert institutional guide lines

The ethics of experts are matters considered by the various organisations and bodies established over the last 20 years or so such as the Academy of

Experts and the Expert Witness Institute. Each will have their own views as to the standards of their members, Codes of Conduct and Practice.

They also have their own means of disciplining members and of enforcing their ethical standards, but examples of what is generally unacceptable may encompass:

- intentional alteration of a report's findings designed to mislead;
- giving false testimony under oath;
- ignoring factual evidence without giving a view when required;
- providing reports containing errors of opinion through lack of knowledge; or attention to detail;
- accepting instructions in cases which are knowingly outside the expert's level of qualification or expertise.

Some of the expert associations may run courses for experts which may be helpful in familiarising the expert with procedures and duties.

Civil procedure rules and court sanctions

The Civil Procedure Rules have accompanying Practice Directions (the more detailed guidance on interpretation and application of the Rules) and PD 35 lays down the format for an expert's report and gives the actual wording for the 'statement of truth' by which it has to be verified. Rule 32.14 provides that proceedings for contempt of court may be brought against a person if he 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. What precisely a 'false statement' is will have to be determined by the courts but it is considered that written or spoken words or possibly conduct calculated to mislead may be sufficient by analogy to the tort of deceit which has been defined as being 'a statement made knowingly or without belief in its truth, or recklessly regardless of whether it be true or false' (*Derry v. Peek* (1889))

Whether it is right to extend this definition in the case of experts to incomplete statements is not clear. If it was then the courts might well follow Lord Cairns in the House of Lords in *Peek v. Gurney* (1873) that there must be 'a some active misstatement of fact or at all events such a partial and fragmentary statement of fact, as that withholding of that which is not stated, makes that which is stated absolutely false.' It is suggested that if that stricter test was applied many experts would be severely tested. On the other hand, in *Cala Homes* (see above and Appendix VII) Mr Justice Laddie's comments on the 'three card trick' made it clear that in his view concealing the truth was tantamount to lying. This underlines the basic idea that if evidence from experts is to be credible it must be thorough.

Input from client's lawyers

While the system remains basically adversarial there is nevertheless a role for the client's lawyers in the preparation and use of experts' reports. It is clear from judicial pronouncements that judges prefer to see the totality of the expert's evidence in the report, but lawyers may have a paramount interest in the interlocutory stage in trying to settle the matter. They see the report as a negotiating tool; judges see it as evidence upon which to base a judgment: therein lies the conflict.

Experts may complain that they have produced a thorough opinion, only to see it dissected by the lawyer. Experts feel that this undermines their professional integrity and that they are being treated like children, but quite often it is simply a misunderstanding of role. Counsel is on a learning curve; he is not the expert and must be educated by the expert for the trial. At the same time, the expert is not a lawyer and he is not skilled in the arts of the advocate. Counsel can see the traps into which the expert may fall, quite innocently, unless the report is tightened up.

Many experts do not find that counsel thoroughly or entirely rejects a report, but that the report simply requires some fine tuning for the purposes of presentation. That does not mean to say that counsel is rewriting the report, or that counsel is taking any responsibility for the opinions expressed therein.

It is very often simply a matter of form. Sometimes it is a matter of expressing oneself in simple language that everyone can understand. Counsel is always anxious to ensure that there is no misunderstanding about what is written in the report.

1.5 *Becoming an expert witness*

Qualifications

The expert need not have become an expert by way of his business. In *R v. Silverlock* (1894) it became necessary to prove that certain documents were in the defendant's handwriting. The prosecution led the evidence of a police superintendent who produced a letter and envelope which the defendant had written in his presence. He also produced a letter which the defendant admitted was in his handwriting. These documents were compared by the prosecution solicitor whose evidence was accepted and admitted by the court. The case was appealed but the Lord Chief Justice decided that the solicitor was an expert in handwriting and had gained considerable skill and experience during the course of his many years of private study of the subject. The question Lord Russell asked was whether the witness was *peritus* – was he skilled? Although it is a criminal case, it is cited here because the Lord Chief Justice was empowered to apply the civil standard of proof, i.e. on the balance of probabilities.

Formal qualifications are not necessary and are not a prerequisite to giving

expert evidence. Academic qualifications alone may be insufficient. Doubts were expressed about them in *Bristow v. Sequeville* (1850) as to the admissibility of the opinion of experts in foreign law where the foreign lawyer had not practised in the foreign jurisdiction. Opinion derived from practical experience may be admitted (*Ajami v. Customs Controller* (1954)). It is however most unlikely that those without appropriate qualifications will be instructed. Solicitors look at academic and professional qualifications as well as the expert's particular experience and expertise in his practising profession and as an expert witness. In the latter aspect the expert's knowledge of the process and practice of the expert witness's role in litigation and dispute resolution will be an advantage.

Nevertheless, sometimes the courts will ask a 'man of skill', e.g. a clerk of works. Such men by their long experience and skill are experts in their field and their opinion on questions arising from their trade may be admissible as expert evidence.

A party can give expert evidence himself provided he is skilled, and provided that such evidence is disclosed (*Shell Pensions Trust Ltd v. Pell Frischmann & Partners (a firm)* (1986)).

Should you consider yourself an expert

If a person has obtained a special skill or knowledge in his trade, profession or calling, or otherwise become *peritus* that would meet Lord Russell's test, then he may consider acting as an expert. No person should readily decide such a matter lightly. The numerous cases of negligence against specialists of all disciplines are a testimonial to the hazards of giving advice. We live in an increasingly litigious world. The general public are becoming ever more litigious and more ready to question decisions and actions of professional and skilled men. Thus the person who puts himself forward as an expert puts himself in the firing line, and may be subjected to rigorous and intensive examination and some very hard and conscientious work. Those who find it difficult to keep pace with their own practice whether as architects, quantity surveyors or engineers, should not venture into the unknown without a clear understanding of the duties and obligations of the expert. It is to that end that this book is devoted. If, however, the expert decides to go ahead with a career as an expert witness along with his practice and he is successful to the extent that his opinions are accepted and prevail, and that he survives the rigours of the system, then he may well find nothing more exhilarating or rewarding in the whole of his professional career.

Most experts are practitioners. They are usually very busy. It is better however to instruct such a person than perhaps others who do expert witness work to the exclusion of professional practice. He must be an expert in his profession otherwise he will not understand nor be able to explain the 'state of the art' – the current accepted practice of his profession, or calling. It is little use an architect giving evidence about a design if he has never designed a similar building.

How can an expert become an expert witness?

There has been an increasing tendency in many professions to tighten up on continuing education. Persons who wish to become expert witnesses may attend seminars run by the Chartered Institute of Arbitrators and other organisations. These courses include mock trials, drafting reports, and working groups but are never any substitute for the hard experience of actually preparing and giving evidence in a case. It is wrong for any one to think that simply because they have acquired some recognition by an institution that is sufficient to enable them to consider themselves an expert witness. A potential expert should first of all be a good practitioner. He should then have substantial experience as a consultant and adviser. He might then after several years, depending on the nature of that experience, be ready to deal with a contentious case. After the experience of court work the expert may wish to perfect his work by qualifying and practising as an arbitrator. Experts with good court experience tend to make good arbitrators and, vice versa, good arbitrators tend to make good experts because they can anticipate how the judge may deal with evidence in order to decide the issue of the case.

Some experts are those who have retired from practice. They are eligible to give evidence for a reasonable period of time after retirement provided they keep up to date with current practice. Usually, the consultant in the practice may be the person who has the time and experience to deal with such questions.

If the expert has a grasp of the fundamental principles of evidence and is well acquainted with experts' duties and obligations and has a mastery of his discipline and the facts, he will succeed in his task. He can learn the principles of evidence and his duties but he must practise his skill to achieve the required purpose. The principles outlined in this book may help him on his way.

Persons who are properly qualified and experienced in their profession may obtain appointments as construction experts by the parties or through an institution or body such as the RIBA, the RICS, the ICE, the Academy of Experts, the Chartered Institute of Arbitrators, or the Law Society.

How experts are chosen

Experts are usually instructed and retained by the solicitor on behalf of the client. The expert, however, is not the representative or agent of the solicitor, he is a consultant acting on behalf of the client. It is advisable that his terms of engagement as an expert are settled by the solicitor and agreed in detail by the client. It is better that the client is responsible directly for payment of the expert's fees and not the solicitor unless the instructions to the solicitor expressly so require.

Solicitors, especially large firms, usually have their own lists of experts but some may seek further information from the Law Society or the appropriate

professional body, e.g. the Royal Institute of British Architects (RIBA); Royal Institution of Chartered Surveyors (RICS); British Academy of Experts. Those bodies have lists of experts and are usually very helpful in giving a selection of names from which to choose. There are a considerable range of associations and institutions from whom lists of persons holding themselves out as experts may be selected. Sometimes solicitors may seek guidance from counsel as to experts in particular cases.

There is nothing better to commend the expert than a good track record. A problem for the budding expert is that he is very possibly untried and untested. For him the best course is to seek appointments in the lower courts, usually in small claims matters, and build up by varying degrees and stages through the local county court and eventually to the High Court. Having graduated through the domestic legal and arbitration system, the expert may well go on to deal with international arbitration.

Sometimes the best experts may not be well known. It is sometimes said that these things are 'old boy networks' or 'closed shops.' Organisations may have their own hierarchy and those who have been there longer may have a particular status amongst their colleagues. That is a matter for those organisations who must run their affairs as they see fit. They may appoint or recommend who they see fit always appreciating that there is an overriding public interest element in their Royal Charter and organisation. In protection of that interest they must ensure so far as they can that those whom they recommend or appoint are suitable.

Solicitors may perhaps have their own database of appropriate experts, but when it comes to appointments each matter must be judged on the merits. It is for those appointing to make the appropriate choice, bearing in mind the overriding objective of the Civil Procedure Rules. Sometimes it may simply come down to a choice of who is the most suitable to work on a particular case: horses for courses.

1.6 Appointment of the expert

Institutional model terms

Expert organisations have published model terms of appointment for experts. These should deal with matters such as briefing, duties, scope of work and fees. There is reproduced in Appendix I the model terms produced by the Expert Witness Institute (website, www.ewi.org.uk).

Position under the Civil Procedure Rules

In a fundamental change the CPR in rule 35.10 states that

- (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

and goes on to say in 35.10(4) that such instructions 'shall not be privileged against disclosure' if there is reason to believe that the statement of instructions in the report is inaccurate or incomplete. Great care therefore has to be taken in instructing experts and the expert has to ensure that he fully understands those instructions.

The TeCSA guidelines

The Civil Procedure Rules do not require specific instructions to be given to experts and nor does the relevant rule affecting the Technology and Construction Court ('TCC'), details in Practice Direction 49C (see Appendix II). However the Technology and Construction Court Solicitors Association ('TeCSA') helpfully provides guidance for solicitors instructing experts in the TCC. By reference to this Protocol (see Appendix III) it appears there are some essential elements that are required for any instructions to expert witnesses in construction cases.

- (1) The expert must agree to act as an expert witness. This entails the expert being informed fully by the solicitor as to the scope of duties required. This is entirely dependent upon the facts of the case and the particular technical matters in issue. The expert should be satisfied that he has adequate resources and is qualified by training and practice to do this job.
- (2) The expert should be supplied with relevant information to confirm that there is no conflict of interest arising in respect of the identified or potential parties.
- (3) He should confirm that he understands his duties to the court and common law, as described generally in the '*Ikarian Reefer*'.
- (4) The expert may be one of a number being considered and should be so informed. He should be asked for details of fee levels, hourly rates and whether he agrees to cap his fees for a certain sum.
- (5) The expert should be required to return all confidential and other documentation submitted to him for the purposes of his duties at the end of the case or earlier termination of his appointment for any reason. He should also be reminded of the rules relating to privilege and admissibility of evidence.
- (6) Detailed suggestions for the brief to the expert are given in paragraph 5 of the Protocol.
- (7) The expert needs to agree the scope and nature of his work: how he is going to undertake it, who he is going to meet and interview, how he will report on his findings from time to time, and how he will take care to control costs in proportion to the work he undertakes. He must advise clients and solicitors accordingly and avoid unnecessary delays and cost.
- (8) The expert must not go outside the terms of his appointment without express consent of the client or the instructions of the client's solicitors.

- (9) The solicitor must agree a time scale with the expert for him to undertake his duties so that he does not compromise the client's case in respect of the applicable rules of procedure.

1.7 The expert's duties to the client

The duties described in this chapter are dealt with in greater detail in the subsequent chapters dealing with formulation of the issues and stages of preparation for trial, but a summary here is useful.

The duties of an expert witness will vary in extent according to the time at which he is appointed and the details of his instructions. Usually an appointment is made, through a client's solicitor, well in advance of any hearing. This does not always mean that the expert is free from the pressure of time because the nature of his duties requires him to give early consideration to various aspects of any dispute.

The expert's duties can be divided into the following four distinct areas:

- (1) initial advice;
- (2) negotiations for settlement;
- (3) preparation for trial;
- (4) hearing before court or arbitrator.

Initial advice

Once a dispute has arisen between parties it can be relatively easy to define the broad heads of claim and counterclaim, but the settlement of such a dispute is far more difficult and in most cases will depend on the facts of the case and the evidence adduced.

One of the first jobs, therefore, for the expert after appointment is to make an assessment of the matters in dispute and present to his client's legal advisers an appraisal of what he has found, for example, of any defects in construction or documentary evidence of problems in the administration of a contract, in order that the client knows at an early stage what the expert's evidence will be.

Upon instructions the expert will often be asked to give an initial appraisal or assessment which is necessarily privileged from disclosure because it is a report affecting legal liability given to the client's lawyers. As such the client may assert that it is privileged from disclosure in evidence.

Instructions to an expert cannot be protected by privilege (rule 35.10(4) CPR), but cross-examination of an expert will not be allowed unless the court permits it, or the party giving instructions consents.

A client armed with this primary advice may be able to negotiate the claim or dispute through his lawyer. Often in practice such report may form the basis of initial discussions between the parties and their advisors as required by the Pre-action Protocol for Construction and Engineering Disputes (see Appendix IV).

The other aim of a preliminary report is to advise the client where he stands in the case: whether he has a good or bad case, and possibly what his chances of proving it may be, subject to legal opinion. At this early stage it is important for the expert to give as accurate an assessment as possible before any heavy costs are incurred or too much time is expended.

The commercial objectivity of the report must be measured against technical expertise so that the client has enough information and advice to decide whether or not pursue the case on its technical merits. An expert must act as a 'devil's advocate' and test the evidence put to him: he cannot afford to take anything for granted and must be cautious in making assumptions. Assumptions must be tested just as much as the facts. However he is not there as a substitute for the court and cannot usurp the court's function. Solicitors instructing experts must also be careful not to mislead experts by asking leading questions that are really matters for the court. Not only is it unnecessary but also a waste of costs and time.

On the matter of costs experts would do well to consider the words of Judge Dyson in *Pozzolanic Lytag v. Bryan Hobson Associates* (1998)

In my view the only issue to which expert evidence could properly have been directed was whether there is a common practice in the engineering profession as to what engineers who are engaged as project managers do in relation to the insurance obligations of contractors. That would have been a short point which should have resulted in short reports. Instead of this the experts prepared quite elaborate reports, dealing with a number of other issues which were inappropriate, and which no doubt added very considerably to the costs of this litigation...

and

The experts plainly went well beyond what the Official Referee had authorised. In view of the imminent implementation of the Woolf Reforms, it is now opportune for everyone who is concerned in civil justice to take a hard look at the whole question of expert evidence. It seems to me that all have a role to play in this, case management judges, legal representatives and the experts themselves. Prolix experts' reports directed to issues with which they should not be concerned merely add to the expense of litigation. Everything possible should be done to discourage this. In appropriate cases, this includes making special orders for costs.

Above all the expert must bear in mind that litigation is very much the client's last resort to resolve the dispute and should only be used when all other means have failed. If litigation is inevitable then it is wise for the expert to remember the fundamental criteria of proportionality. This means that steps taken in proceedings including the provision of expert evidence must have regard to:

- the amount of money involved;
- the importance of the case;

- the complexity of issues; and
- the financial position of the party.

Experts need to be aware of these aspects and costs issues. Under the new rules the courts take into account various factors in ordering costs. Primarily these are the concern of solicitors but there is no harm in reminding the expert that the court will consider the conduct of the parties before and after proceedings are issued, including compliance and respect for any pre-election protocol covering attempts to identify the issues and settle, whether it is reasonable for a party to pursue particular allegations, and the manner in which they are pursued.

Whereas formerly costs almost inevitably 'followed the event' (i.e. the winner had most of his costs paid by the loser) in most cases the new cultural impact of the Woolf reforms suggests that the courts will look at these other factors in making any award.

Negotiations for settlement

By far the majority of disputes are settled 'out of court' and do not proceed to a hearing. Of those settled many will reach agreement before coming before a judge or arbitrator and in those cases the expert is likely to have been involved with his client's team and the opposing expert in the negotiations leading to such a settlement.

Other disputes will continue to the commencement of a hearing when the lawyers' exercise of brinkmanship has not resulted in settlement earlier. Even then a large number of these cases will be determined after one or two days of hearing following further negotiations by the legal teams in the corridors of the court.

Although the title 'expert witness' may give the impression of a person who spends most of his time in court giving evidence, in fact more than 80% of his time is spent on analysis of evidence, preparation of reports and on meetings with his legal team or the opposing expert with a view to negotiating a settlement out of court. The objective is, of course, to get a satisfactory settlement and, if possible, to save the considerable costs involved in a court or arbitration hearing which consumes many man hours for which one or both the parties will eventually pay.

Part 36 offers

Before the era of the Woolf reforms defending parties could go some way to preserve their position on the costs of litigation by making a 'payment into court'. The defendant, in consultation with his legal team and expert, would take a view on what he might at the end of the day be ordered to pay and would pay that amount into the court office, giving notice that he had done so to the claimant. If the claimant accepted that was the end of the case.

However, if the claimant proceeded to trial and was ultimately awarded less than the payment in, the usual rule that the successful party's costs are paid by their opponent was reversed and the claimant would have to pay the defendant's costs from the date of the payment in.

With the emphasis on early settlement the CPR have widened the scope of this procedure and under Part 36 such formal offers of settlement can be made even before the action has commenced and by either party. Depending on the nature of the case a quantum expert (usually in construction cases a quantity surveyor) may be involved in this procedure, advising on what offers should be made and whether an offer that has been received should be accepted.

Sealed offers

There is a similar procedure to preserve one's position on costs in arbitration proceedings. A sealed offer is an offer in writing made by one party to arbitration proceedings to settle the arbitration on particular terms forming the basis of a financial settlement of all the issues in dispute in the arbitration reference.

Such offer is lodged with the arbitrator in a sealed envelope. (See the section on Sealed Offers in the Glossary (p. xv) for a fuller description of the process.) The arbitrator can only open the letter when the issue of costs is raised. This was described by Mr Justice Donaldson, as he then was, in *Traumountana Armadora SA v. Atlantic Shipping Co. SA* (1978):

A 'sealed offer' is the arbitral equivalent of making a payment into Court in settlement of the litigation or of particular causes of action in that litigation. Neither the fact, nor the amount, of such a payment into Court can be revealed to the Judge trying the case until he has given judgment on all matters other than costs. As it is customary for an award to deal at one and the same time both with the parties' claims and with the question of costs, the existence of a sealed offer has to be brought to the attention of the arbitrator before he has reached a decision. However, it would remain sealed at that stage and it would be wholly improper for the arbitrator to look at it before he has reached a final decision on the matters in dispute other than as to costs, or to revise that decision in the light of the terms of the sealed offer when he sees them.

The difference between a sealed offer and a Part 36 offer is that in the former the promisor does not have to part with any cash, whereas under the Civil Procedure Rules he does. In the latter case, whilst it may provide a detriment to the payer, it is of undoubted benefit to the payee because he has the security of knowing that the sum is available to be paid to him.

Preparation for trial*Typical activities*

Whether the issue is to be heard before an arbitrator or one of the Technology and Construction Court Judges, the preparation for trial is likely to involve the expert in the following activities:

- co-operation with the client's legal team;
- preparation of a draft report dealing with the facts and expressing the expert's views on the issues;
- dialogue with the client's solicitor and barrister (counsel);
- review following 'disclosure' of opponent's documents;
- extraction of relevant evidence from documentation and records;
- review of relevant witness statements when exchanged;
- preparations of data for the Scott Schedule (see later);
- meeting with the expert appointed for the other side;
- preparation of a final report for exchange with the opposing expert;
- preparation of Statement of Issues and reasons why they are not agreed;
- research of support material for his expressed views; i.e., codes of practice, British Standards, byelaws, building regulations, manufacturer's specifications, etc.;
- preparation of estimate for remedial works or assessment of loss and expense;
- the role of devil's advocate.

Working as part of a team

In any litigation or arbitration the expert witness is merely one member of a team appointed by the client to assist in resolving the dispute. The solicitor and counsel appointed are other key members of that team. The lawyers have to present the argument before the court or tribunal and it is therefore their task to decide on tactics and approach. They are the client's managers.

The expert must use his best endeavours to work to deadlines that are imposed by the court's directions to give counsel sufficient time to review matters before any application is made or hearing attended.

The expert must also exercise all reasonable skill care and diligence applicable to his professional discipline in providing such opinion evidence upon which the client and his legal team may rely for the purposes of the proceedings. The expert's duty is continues until the end of the case, either by a settlement of all the issues or final judgment.

In major complex construction cases in recent years lawyers employ paralegal teams to deal with the documentation and evidence. That approach was dictated by the complexity and extent of some cases. It has long been the practice for counsel, solicitors and experts to liaise in their independent roles in pursuing litigation or arbitration. In smaller or medium

range cases, the expert is not consulted so frequently. In a major case, however, his attention will be required constantly. In that sense, he may have to work with solicitors, sometimes in their office, and with others. He will no doubt find that, of necessity, he must delegate certain areas of his work, for example gathering evidence by way of surveys from the site, quantifying the amount of the claim with the assistance of a quantity surveyor, and obtaining other specialist technical advice, for example the chemical composition of the material which may be in dispute.

On the legal side, it will be necessary for the solicitors to have a partner in charge of the team, assisted possibly by one or two other solicitors or perhaps an articulated clerk, or other paralegal assistance. Frequently, it will be necessary for the solicitor's team and the expert's team to work together on some aspects. Just how often such a team functions as a cohesive unit depends upon those involved, and the particular way in which the litigation or arbitration is conducted.

If, as a matter of choice, it is decided that a team would be appropriate in the circumstances of the case, then it should have as its objects:

- (1) the co-ordination of all fact finding investigations on site;
- (2) the examination of all potential witnesses of fact;
- (3) regular conferences to discuss issues of evidence and pleadings;
- (4) the formulation of the case based on thorough investigation;
- (5) the review of negotiations and further tactics to be employed in order to secure a possible early settlement and save costs and time.

Over the years construction cases have been noted for their length and complexity dictated by the exigencies of the case. But the idea of 'justice on the merits' under the former Rules of the Supreme Court has now been superseded by the doctrine of 'proportionality' so the courts can keep a watchful eye on the expenses incurred by the parties and disallow unnecessary costs.

These days however a careful watch must be kept on costs in relation to value so the resources directed to the case are not disproportionate to what is in issue

Experts' meetings

Rule 35.12 provides that the court may at any stage direct that there be discussions between experts. The experts should identify the issues and where possible reach agreement on any that can be so agreed. Following such discussions the experts may be directed to prepare a statement for the court stating the issues upon which they are agreed, the issues upon which they are not agreed and a summary of their reasons for disagreeing.

The expert should attend all meetings convened by solicitors or the court and provide appropriate preliminary and final reports for use by the legal team and for the use of the court as may be directed from time to time.

Experts are encouraged to meet before they exchange reports (paragraph 17 of the TeCSA Protocol). Meetings of experts should be meetings without the intervention of lawyers but solicitors may set the agenda because the meetings must deal with the issues in the proceedings (paragraph 19 of the Protocol). (See Appendix III.)

It is normal procedure for any meeting of experts from the opposing sides to be arranged in liaison with their legal advisers. Each expert must be free to make an independent appraisal of the matters in dispute but there is no reason why opposing experts should not inspect evidence together.

Where the dispute relates to alleged faulty workmanship or other elements of construction which need to be opened up, it is common practice for one expert to inform the others of any exposure he proposes, so that there is an opportunity for both to see what is revealed.

Where the matters in dispute relate only to such things as contractual issues, which will largely be assessed from a study of the documentation produced whilst the works were carried out, the opposing experts may not be asked to meet each other until they have had the opportunity to report to their clients and express their objective appraisal of the items in dispute.

When the meeting takes place the objectives will vary. Ideally the solicitor or barrister acting for each client will outline to the expert witness the purpose of any meeting they propose.

It is normal procedure for the discussions to be held entirely 'without prejudice'. In this atmosphere they can often be of an exploratory nature. Frequently meetings of experts are at the direction of the judge or arbitrator, following a case management conference or pre-trial review, and in these circumstances the directions issued may specify the objective of such meetings.

In some instances the sole purpose of a meeting is to agree figures. This involves little more than an agreement that the mathematics of a claim are correct and perhaps that the rates used have been accurately transferred from a bill of quantities or specification and schedule of rates. At such meetings the expert witnesses are doing very valuable service to all parties, as it is clearly much less expensive for two people to get together to agree matters of detail, rather than leaving them in dispute until the time of a hearing when the whole team of legal and other professionals for each side will have to sit through the process while the same details are related by the witnesses before the judge or arbitrator. The objective of the Woolf reforms is to reduce the issues in dispute and the costs of litigation.

As the expert witnesses acting for the separate parties should be able to take a more objective and detached view than the professionals who have been involved in the events leading up to the dispute, they are more likely to be able to narrow the gap between the parties by agreement of facts. It is not so easy to obtain a consensus of agreement where matters of principle are involved. This is largely because in many construction disputes valid arguments can be put to support alternative principles. Where agreement between the parties is not eventually reached and the dispute results in a hearing before an adjudicator, arbitrator or TCC judge, then the issue will be

decided on the basis of which side put the most convincing argument determined by the weight of the oral and written evidence. This will lead to a decision, award or judgment based on the balance of probabilities.

The hearing

If the case is not resolved by negotiation, mediation or adjudication then it may proceed to trial or hearing. Trial in court is a more formal setting than proceedings before an arbitrator. Even the layout of the chamber in which the matter is heard affects the atmosphere. Most building disputes are heard by TCC judges at St Dunstan's House, a relatively modern building with reasonable facilities in New Fetter Lane, and at other designated regional centres. Arbitrations are held at any convenient location where conference facilities can be booked.

Whatever the role the expert witness has fulfilled in preliminary discussions with his client and his advisers, when he appears in court or before an arbitrator he appears for the purpose of assisting the court. He is there solely to assist the judge or arbitrator in arriving at his judgment or award. The interests of the client who has engaged him are totally subordinate to this paramount duty.

Giving evidence

The evidence of an expert witness is likely to be of considerable importance at a hearing. If it were not so the client would have been advised earlier that the expense of engaging an expert was unjustified and disproportionate. The expert witness should therefore ensure that the presentation of his evidence does justice to the importance of its content.

The following matters should be borne in mind at this stage:

- (1) The responsibility for the presentation of the case rests primarily with counsel. By the time the hearing has arrived he should be fully aware of the expert's views on the issues in dispute and of his professional opinion of the opposing evidence. It may well be that the lawyers have decided to concentrate on a particular aspect of the evidence, and the questioning in such circumstances will be framed in order to highlight that emphasis. The expert witness should avoid the temptation to enlarge his answers to the questions asked, even though he may feel frustrated that his own particular preference as to what is the most important element of his evidence appears to be overlooked. Ideally the expert witness should have been made aware during conference with his client's solicitor and barrister of the way the questioning is to be approached, but he cannot and must not be told what to say.
- (2) The expert should be careful to present evidence that relates directly to the facts of the particular dispute which is the subject of the hearing. It

will also be necessary to explain to the court or arbitrator the reason why any particular principle, formula or theory put forward by the other party is not applicable to the issues being heard.

- (3) When responding to a question put to him by lawyers representing either party, the witness should address the judge or arbitrator when giving his answer.
- (4) The expert should answer the question he is asked and no more, keeping to the point and not arguing with the judge or counsel.
- (5) Finally he should speak up and speak distinctly, and tell the truth.

'Weight' of evidence

While professional qualifications may influence the weight which is attached to an expert's evidence of opinion and fact, anyone with considerable knowledge or experience of the matters in issue can appear as an expert witness.

It is not the quantity of evidence which is of prime importance but the 'weight' of such evidence that is presented to the court. 'Weight' as defined by Terence Anderson in *Analysis of Evidence* is 'a vague term ordinarily used in expressing judgments about the net persuasive effect of a mass of evidence, typically for a case as a whole'. The 'weight' given to the evidence presented to a judge or arbitrator will be determined by considerations such as:

- the witness's first hand knowledge of events;
- the extent of his experience in similar work;
- his standing in his trade or profession;
- the status of the book, standards or research material relied on to support the view he has taken;
- the judge's or arbitrator's view of the thoroughness of the witness's investigations;
- the credibility of the witness;
- the impression given of the witness's honesty and reliability.

When questions are put to the witness by the lawyer representing the opposing party they are often for the purpose of undermining the judge's confidence in that witness in respect of the above points.

The 'performance' of the expert witness under questioning from the lawyer acting for his client, and under cross-examination by the opposing lawyer, could become the deciding factor in whether judgment is given for or against his client. In circumstances where there are a number of technical solutions to a problem in dispute, all of which are recognised within the industry, it will be the witness who convinces the court that the solution he offers is the more likely and probable explanation who will win the day.

Evidence of the opposing party

When listening to the evidence of witnesses called by the opposing party, the expert should pay careful attention to the technical content and argument.

Any notes taken while the opposing witnesses are being examined should normally be passed to the solicitor acting for the expert's own client and given to counsel straightaway so he may consider the point for cross-examination. Each note should be dated and marked with the time. If it is of immediate consequence, the degree of importance must be indicated. In some arbitration proceedings the informality of the hearing and the location and layout of the chamber in which the hearing takes place necessitate the passing of these notes directly to counsel. It should be remembered, however, that the counsel's advocacy is planned and that both the content and timing of the questions posed by him are part of his tools of the trade.

1.8 The expert's role outside the court/arbitration system

Alternative Dispute Resolution (ADR)

Developing in the USA in the 1980s and slowly spreading in popularity in the UK, means of resolving disputes other than adversarial litigation or arbitration have been formulated to provide solutions that can preserve the working relationship between the parties which a hard-fought court battle would usually destroy. Where each party has claims and counterclaims there is, if the appropriate mind-set is also present, the possibility of a negotiated settlement.

The regime following the introduction of the Woolf reforms places considerable emphasis on early settlement and alternatives to litigation. The aim of the Civil Procedure Rules is to promote the fair and just resolution of litigation by proportionate means, i.e. the costs of resolving the dispute are not unreasonable when considering the amount at issue. The courts have a duty to manage the case which entails, *inter alia*, encouraging mediation and ADR, permitting pre-trial disclosure of documents in the other side's possession, conformity with pre-action protocols, offers to settle under Rule 36 and summary disposal of issues so as to narrow the dispute and help the parties to settle the whole or part of the case.

The 'Pre-action Protocol for the Construction and Engineering Disputes', guidance to parties issued by the Lord Chancellor's Department in August 2000 (Appendix IV), in paragraph 5.1, requires the parties to meet at an early stage to consider (paragraph 5.2) 'whether, and if so how, the issues might be resolved without recourse to litigation'. Under the CPR generally judges have a wide discretion to penalise a party in costs if protocols have not been followed or if they have been unreasonably obstructive in attempts to narrow the issues or achieve settlement.

The CEDR (Centre for Effective Dispute Resolution) holds lists of trained conciliators and mediators who can facilitate negotiated settlement. With

appropriate personal skills and additional training an experienced expert in the relevant field to the dispute in question would be an ideal person to act as such a mediator. (See Chapter 6.)

Adjudication under the 1996 Act

Part II of the Housing Grants, Construction and Regeneration Act 1996 applies to all building contracts entered into after 1 May 1998 and provides for speedy adjudication of disputes arising during the course of the contract. The matter may be litigated or the subject of arbitration at a later stage, but in the interim the adjudicator's decision is binding and orders for payment have to be met.

Again there is a role for the professionally qualified 'claims consultant' in presenting the client's case to an adjudicator, either in writing or as an advocate at an oral hearing, or, indeed acting as the adjudicator. Undoubtedly numerous construction claims experts have been empanelled as adjudicators by one or other of the adjudicator nominating bodies to represent clients or act as adjudicator under the 1996 Act. The irony for the English construction industry, as Ian Duncan Wallace has eloquently said, is that

England now looks like having many more would-be adjudicators offering to sit in judgment on the nation's active architects and engineers than there will be active architects or engineers.

(HGCR: *Swarms of Wannabees?* (1999) Const. Law Journal)

1.9 Qualities of an expert witness

It will be clear from what has already been said that the expert witness will be involved in a wide variety of activities which will require differing qualities. Few individuals will possess them all.

The list below (in no particular order of importance) will alert the expert witness to the qualities best needed to tackle the various activities. As relatively few disputes go the whole way to judgment, it will be appreciated that the qualities most beneficial when giving evidence may not be needed very often.

From a study of the list it is hoped that the reader will be able to appraise himself, and, where a lack is identified, he should recognise the weakness and be alert to ensure that it is not exploited.

It is difficult to categorise the qualities required of experts but obvious ones include:

- an analytical mind;
- objective judgment;
- recognition of the merits in alternative approaches;
- concise reporting;

- an interest in researching;
- patience;
- tact;
- the ability to resolve issues capable of resolution, in the course of the procedural process;
- coolness under pressure;
- a calm outlook that is not easily antagonised;
- realism;
- honesty, integrity and credibility;
- relevant experience;
- thorough technical knowledge including alternative approaches.

In carrying out his preliminary duties the expert witness will rely heavily on his experience of the matter in dispute, which he will need to analyse and about which he will need to make an objective judgment. At this stage it will be helpful to recognise the merits of alternative points of view, alternative methods of construction, design etc. keeping an open mind on the possibilities of settlement.

Chapter 2

Contracts, Claims and Damages

2.1 General

The construction expert may be from a range of professions or backgrounds, such as

- an architect;
- a quantity surveyor;
- an engineer – structural/civil/mechanical/electrical;
- a building surveyor;
- a project manager;
- a construction manager;
- an accountant/auditor, or simply;
- a ‘man of skill’ who has expertise by virtue of practical experience on site.

Before describing in any detail the scope of the construction expert’s general duties, this chapter will look at work under the following headings:

- (1) contract claims;
- (2) claims involving breaches of statutory duty (including Building Regulations);
- (3) negligence claims.

2.2 Contract claims

The substantive law on these subjects is outside the scope of this book and the construction expert is referred to the standard text books on this subject, in particular *Keating on Building Contracts*, 7th edition, edited by Vivian Ramsay and Stephen Furst and *Hudson’s Building Contracts* edited by Ian Duncan Wallace.

The preparation and compilation of contract claims occupies the time of most construction experts. Experience in investigation techniques, evaluating evidence and deciding what is relevant are the key skills of the claims expert. Together with these skills the expert needs to have a general knowledge of the law relating to contract claims and in certain cases a very detailed practical knowledge of the contract. The interdependence of claims experts is often of key importance to the success of the case. What is crucial is that the expert of a particular discipline appreciates the limits of his expertise in a particular field.

Standard forms

Most construction experts will have a general working knowledge of the applicable general legal principles as well as a sound knowledge of the standard JCT and ICE forms of building and engineering contracts, but it is useful to give brief descriptions here.

(1) **ICE 7th Edition 1999**

The standard form of civil engineering contract is now in its seventh edition and is issued jointly by the Institute of Civil Engineers, the Association of Consulting Engineers and the Federation of Civil Engineering Contractors. The employer pays for the works carried out by reference to the schedule of rates or particular works which can vary according to quantity i.e. a remeasurement, not a lump sum contract.

(2) **ICE Minor Works Form (1998) (MWC, 1998)**

This form applies to minor engineering works as prescribed by the Institution of Civil Engineers. The notes of guidance to MWC 1998 state that its intended use is for small risks, where the period of work does not exceed six months generally, works are simple and straightforward by nature, the value does not exceed £250,000, the contractor does not have any design responsibility, and the design of work is usually complete before tenders are invited. Nominated sub-contractors are not employed.

(3) **JCT Minor Works Form (1998) (JCT MW 98)**

This form was designed for use where minor works were to be carried out for an agreed lump sum and where the architect had been appointed on behalf of the employer. The form is used where there are no detailed remeasurements but a lump sum offer based on drawings and/or specifications and/or schedules, and it applies to contracts worth £75,000 to £200,000

(4) **JCT fixed fee form for prime cost contract for building works**

This form of contract covers specific items of works at prime cost referred to in the drawings and specification of the work. The contractor carries out such work for the prime cost plus the fixed fee stated in the third schedule.

(5) **JCT 98 private with/without quantities (local authorities with/without quantities)**

These forms are used for major new building contracts where the value exceeds £1m including refurbishment works, repairs and alterations.

(6) **JCT With Contractor's Design (JCT 1998 WCD)**

This contract embodies the employer's design requirements and the contractor's proposals to effect such design in construction; the contractor being liable for the design and the construction of the works. It is a lump sum contract with interim monthly payments.

- (7) **NSC/C**
This is a standard form of nominated subcontract (NSC/4 and NSC/C (1998 Edition)) which is used where the subcontractor is nominated by the architects as agent of the employer.
- (8) **DOM/1**
This is a standard form of domestic subcontract for use with JCT 98 local authority/private/with quantities. It is published by the National Federation of Building Trades Employers (NFBTE), the Federated Associations of Specialists and Subcontractors (FASS) and the Confederation of Associations of Specialist Engineering Contractors (CASEC).
- (9) **JCT Management Contract 1998**
This is part of the JCT works package of contracts which together with the works contracts combines to make construction planning quicker on site and construction of less risk to the management contractor. Most of the risk falls to the individual works contractors who carry out the work. Disputes can be particularly complicated; the liability of the parties relatively uncertain. This form has been popular on certain major city developments but is probably not well suited to one-off developments. Owners have been advised against it.
- (10) **Model Form of General Conditions of Contract (MF/1)**
A form for the supply of electrical, electronic or mechanical plant
- (11) **The Engineering and Construction Contract (ECC)**
The ECC form (formerly the New Engineering Contract (NEC)) was intended to replace the JCT and ICE standard forms. It has not done so despite considerable publicity. Its standard core provisions and optional clauses are perhaps a good idea in theory, but in practice difficult to administer.

Typical contractual problems

Claims may be divided into claims by and on behalf of the employer or developer against contractors and professional teams, and the reverse situation where the contractor or professional claims against the employer. The schedule which follows gives a guide to the particular expertise that may be required in dealing with the specific contractual claim. It is by no means exhaustive and each case must be reviewed in the context of its particular facts. Legal advice should be sought to decide what type of expertise is required to prove the case on the balance of probability.

Schedule of claims disciplines

Claim	Grounds of Claim	Discipline
Claim for defective work	Clause 1.1 JCT (MW) 1980	Architect/Surveyor
	Clause 1.1 JCT (MW) 1998	
	Clause 1.1 JCT (IFC) 1984	
	Clause 1.1 JCT (IFC) 1988	
	Clause 2.1 JCT (WCD) 1998	
	Clauses 13 ICE 6th ed	Engineer
	Clauses 3.6.1 and 8.1 7th ed	
	Clause 2 JCT 1980	Architect
	Clause 2 JCT 1998	
Claim for Liquidated Damages	Clause 24 JCT 1980	Quantity Surveyor/Cost Consultant
	Clause 24 JCT 1998	
	Clause 4.2.3 JCT (IFC) 1984	
	Clause 2.7 JCT (IFC) 1998	
	Clause 2.3 JCT (MW) 1980	
	Clause 2.3 JCT (MW) 1998	
	Clause 47(1) and (2) ICE 6th ed	
	Clause 47(1) and (2) ICE 7th ed	
Claims for damages for repudiation	Clause 27.4 JCT 1980	Architect
	Clause 27.2 JCT 1998	

Claim	Grounds of Claim	Discipline
Claims for extension of time	Clause 25 JCT (WCD) 1980	Architect
	Clause 25 JCT (WCD) 1998	
	Clause 22 JCT (MW) 1998	
	Clause 2.3 JCT (IFC) 1984	
	Clause 2.3 JCT (IFC) 1998	
	Clause 12.6 ICE 6th ed	Engineer
	Clause 12.6 ICE 7th ed	
	Clause 2 NSC/A. NSC/C 1998	Architect
	Clause 11.2 NSC/4 NSC/4a 1980	
	Clause 3.6 JCT (MW) 1998	
	Clause 3.6 JCT (IFC) 1984	
	Clause 3.6 JCT (IFC) 1998	
	Clause 52 ICE 6th ed	Engineer
	Clause 52 ICE 7th ed	
	Clause 36 GC/Works/1 Two Stage Design and Build (1999) Clause 28(2) GC/Works/1 (1989)	Architect/Engineer
Claims for Direct Loss and/or expense	Clause 26.1 JCT 1980	Quantity Surveyor
	Clause 26.1 JCT 1998	
	Clause 13(3) ICE 6th ed	
	Clause 13(3) ICE 7th ed	
	Clause 13 NSC/4. NSC/4a 1980	
	Clause 4.38.1 NSC/C (1998)	

Claim	Grounds of Claim	Discipline
Valuation of supervising officers instructions	Clause 9 GC/Works/1 (1989)	Quantity Surveyor
Prolongation and disruption expenses	Clause 5.3 GC/Works/1 (1989)	
Loss or damage	Clause 19 GC/Works Two Stage Design and Build (1999)	
Design	Clause 10 GC/Works. Two Stage Design and Build (1999)	
Workmanship	Clause 31 GC/Works/1 Two Stage Design and Build (1999)	Architect/Engineer
Liquidated damages	Clause 29 GC/Works/1 (1989)	
	Clause 5.5 GC/Works/1 Two Stage Design and Build (1999)	
Extension of time	Clause 36 GC/Works/1. Two Stage Design and Build (1999)	
	Clause 28 GC/Works/1 (1989)	

The above categories are not exhaustive and others will readily occur to the expert but it serves as a guide to the variety of disciplines involved in the claims process.

A range of expert knowledge may be required in any given case, and the expert should be aware that, although he may be instructed to prepare a loss and expense claim, he may also be required to give evidence in support of any claim for set off or on the counterclaim.

The above schedule demonstrates two types of claims:

- (1) those which are claims under the contract provisions themselves by way of entitlement, e.g. claims for extension of time and claims for liquidated damages; and
- (2) those which arise from a breach of the contract provisions.

2.3 Damages

Only a general knowledge of this subject is required by the construction expert. For advice on this matter the expert will be referred to the views of counsel and those instructing counsel in any particular case. However, the general objective of an award of damages is to place the party whose legal rights have been violated 'in the same position, so far as money can do, as if his rights have been observed', per Lord Justice Asquith in *Victoria Laundry (Windsor) Limited v. Newman Industries Limited* (1949).

Damages may be awarded provided that they are not considered remote. The basis for awarding damages stems from the rule in *Hadley v. Baxendale* which deals with cases both where the aggrieved party has no special knowledge and where he has special knowledge. Under this rule damages are such as may

'fairly and reasonably be considered either:

- (1) arising naturally, [from the breach of contract] ... or
- (2) such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it'.

Liquidated damages

This is perhaps the most common form of breach of contract in the construction industry where the contractor fails to complete by the contractual date of completion. By the basic principles of contract law any such delay would amount to a breach on the part of the contractor entitling the employer to such damages as he could prove in court that he had suffered. This is a most unsatisfactory position so from the 19th century the practice developed of writing into construction contracts clauses by which the parties agreed that liquidated damages at a specified rate would be paid at a rate of so much per day or per week in the event of the delay to the completion date arising from the contractor's default or specified neutral events for which the contractor takes the risk. This is of benefit to the contractor in so far as he will have certainty as to the level of damages for which he will be liable if he delays and adds incentive to complete on time. It is of benefit to the employer in that the damages (often very difficult to quantify in real terms) do not have to be proved in court, are immediately payable and can be deducted from sums due to the contractor.

Liquidated damages are a genuine predetermined estimate of the damages contemplated by the parties at the time they enter into the contract. Where the contractor is in delay, and practical completion of the buildings has not been achieved by the contractual date for completion, the employer may levy liquidated damages at the appropriate rate specified in the appendix to the contract.

The tests for liquidated damages were set out by Lord Dunedin in the House of Lords in *Dunlop Ltd v. New Garage Co. Ltd* (1915). In summary these principles are as follows:

- (1) When considering what the parties to the contract intended by the use of words such as 'penalty' or 'liquidated damages', the court must look behind what the parties say to ascertain their clear intention.
- (2) The essence of a penalty (which the court would disallow) is a payment of money stipulated as *in terrorem* of the offending party, whereas the essence of liquidated damages is a genuine covenanted pre-estimate of loss.
- (3) Whether a sum stipulated is a penalty or liquidated damages is a question of construction which is to be decided upon the terms and inherent circumstances of each particular contract. This is judged at the time the parties entered into that contract and not at the time of breach.
- (4) The court will consider a sum to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach.
- (5) It will be held to be a penalty if the breach consists only in not paying a sum of money and a sum stipulated is a sum greater than the sum which ought to have been paid.
- (6) There is a presumption that it is a penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events some of which may occasion serious damage and others trifling damage.
- (7) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

Damages for breach

Repudiation

Repudiation is defined in *Keating on Building Contracts* as:

'an absolute refusal by the employer to carry out his part of the contract, whether made before the works commenced or whilst they are being carried out.'

Examples of repudiation may include the grounds specified in the JCT regime of contracts. They would depend upon the facts and the relation the breach bears to the employer's contractual obligations, e.g. where the employer fails to give possession of the site, provided that the breach is sufficiently serious that the other party regards the breach as bringing the contract to an end (*Felton v. Wharrie* (1906)).

Partial completion

If the employer repudiates and only part of the work has been completed the contractor may either:

- (1) sue for damages, the measure of damages being the loss of profit on the unfinished work plus the value of the completed work at the contract price; or
- (2) treat the contract as repudiated and claim in quasi contract on a *quantum meruit* for a reasonable price for the work carried out.

Uneconomic working

This claim is usually made where through the employer's fault there has been delay in completion or disturbance of the contractors in the regular progress of the work. There is no fixed method, but one approach frequently used in practice is to compare legitimate labour costs expended with those contemplated at the time of the contract. In order to do that one must review the price of the labour element in the contract bills and also the labour content of records maintained by the contractor. The difference between the bills cost and the recorded cost less any other damages for any other cause is a useful starting point to the assessment of damages for uneconomic working.

Breaches by the contractor

Where the contractor fails to complete the works the employer is entitled to recover damages, the measure of which is the difference between the contract price and the amount it would actually cost the employer to complete the contract work, substantially, as originally intended in a reasonable manner at the earliest reasonable opportunity (*Radford v. De Froberville* (1977)). Other breaches occur where for example, the contractor continuously fails to perform to a reasonable standard and produces poor quality work or refuses to carry out the works in accordance with the contract or abandons the site and the works (e.g. *Hoenig v. Isaacs* (1952))

Betterment

Where the contractor is in breach of contract and the claimant claims damages for the repair and reinstatement of the building works, damages will not be reduced for betterment if the claimant had no reasonable choice (see *Harbutt's Plasticine v. Wayne Tank & Pump Co. Limited* (1970)). This would not be the case when the award of such damages would be absurd (see *Bacon v. Cooper (Metals) Limited* (1982)).

Direct loss and/or expense

By far the most popular claim these days by contractors against employers is the claim for loss and/or expense. Where normal profit margins remain low, contractors will always be concerned to take full advantage of the interpretation of any contract for their fiduciary benefit. It seems that almost from the commencement of the contract the claims-experienced contractor will employ his team of private quantity surveying claims consultants to review the design and progress to ensure that no opportunity for making a claim is missed. As Lord Justice Lloyd commented in *McAlpine (Humberoak) Limited v McDermott International (No.1)* (1992), 'it seems to be the practice in the construction industry to employ consultants to prepare a claim almost as soon as the ink on the contract is dry'.

Consultants so engaged are of necessity partisan to the extent that there is very little possibility of them having the criteria or quality of independence required to act as experts under the new Civil Procedure Rules. There is, however, every expectation that they will assist or represent the contractors' interests at any adjudication, particularly under Part II of the Housing Grants, Construction and Regeneration Act 1996.

2.4 Breach of statutory duty

Cases based on breach of statutory duty are rare in construction contract matters, although the expert may often come across situations where there is evidence of such a breach.

In certain cases a statute may create a positive duty and then it is a question of interpretation for lawyers as to whether breach of that duty gives rise to an action in tort. If so, then the claimant may have an action for breach of statutory duty.

The expert in construction should have a working knowledge of statutes such as the Town and Country Planning Acts, the Public Health Acts, the Housing Acts and the Building Act 1984, and also the Regulations made under them all of which affect construction. In any particular case he may have to investigate and acquire knowledge of particular statutory applications.

Contravention of health and safety provisions

Where there is a breach of contract by the employer or the contractor fails to comply with the appropriate statutory provisions, e.g. the Health and Safety at Work Act, the extent of breach concerned must be very carefully considered in the circumstances of the case. The construction industry is a physically dangerous industry. The building of major projects e.g. railways, tunnels, bridges, power stations and house building all have particular hazards. In *Construction Law* (Sweet and Maxwell (1998)) Professor Uff cites 157 fatalities and 20,000 injuries in 1988 alone.

In 1994, Parliament gave effect to the European Directive on construction site safety in the Construction (Design and Management) Regulations 1994 ('CDM'). Under these Regulations the developer must appoint a Planning Supervisor and a Principal Contractor responsible for ensuring regulation compliance and the regime has done much to reduce injuries and fatalities in the industry.

Breach of the regulations does not give rise to an automatic claim of right in law i.e. the right to institute civil proceedings by way of claim. It must be shown that:

- the regulation was intended to protect a class of which the claimant was a member;
- the regulation was broken;
- the claimant has suffered damage of a kind against which the regulation was intended to protect; and
- the damage was caused by the breach.

Building Regulations

These Regulations are made primarily for securing the health and safety of people affected by buildings once they are functional, furthering the conservation of fuel and power, and preventing waste, undue consumption, nuisance or contamination of water.

Whether the Building Regulations themselves give rise to a statutory duty which creates a strict liability irrespective of proving the mental element is not entirely clear, but it seems from views expressed in the Court of Appeal by Lord Justice Waller in *Taylor Woodrow Construction (Midlands) Limited v. Charcon Structures Limited* (1982) that a breach of the Regulations by themselves would not give rise to an action for damages for breach of statutory duty without some proof of negligence. He seemed to follow Mr Justice Woolf (as he then was) in *Worlock v. Saws (a firm) and Rushmore Borough Council* (1983) in concluding that the breach of the Building Regulations was not a breach of an absolute or strict statutory duty but of a duty which was tantamount to a duty of care.

Experts, whether engineers and architects, will usually have a good working knowledge of the Regulations. 'Building' under the 1984 Act is defined in very wide terms to include some structures one would not ordinarily consider as a building it including 'any other structure or erection of whatever kind or nature (whether permanent or temporary)'.

There have been a number of cases concerning Building Regulations over the years and the following are of general interest.

Ketterman and Others v. Hansel Properties Limited and Others (1987) covered breaches of Regulations in respect of defective foundations: they were too shallow, the infill was of the wrong type, and they were located too near trees. The building was described as 'doomed from the start'.

There was a more complex pattern of blame in *John George Hawk v. RF*

Darby (t/a Albion Contractors) and Canterbury City Council (1985) The claimant in this case engaged the defendants to build an extension. The claimant's father-in-law, who was not appropriately qualified, proposed the plans which were passed by the Council. Subsequently there was structural movement and some cracking. Although the foundations had been approved by the Council's Inspector they did not comply with the Building Regulations. The building inspector failed to consult the local authority and discover the existence of a sewer. At the end of the day Canterbury City Council were held negligent.

In *James McKinnon v. Courtney Metropolitan Developments Limited and Elmbridge DC* (unreported) it was held that the Council was under a duty to inspect and exercise its duty of care in approving plans. The Council was in breach of its duties of inspection insofar as the brick foundations should have been taken down below the level of the tree roots and the hardcore infill was unsuitable. The Council was negligent in its inspection and a competent building surveyor ought to have foreseen the likelihood of damages resulting from each of the breaches of duty.

In *Thomas and Others v. TA Phillips (Builders) Limited and Taff Ely Borough Council* (1986) it was held that the builders were liable for negligent construction of foundations and breach of statutory duty in failing to comply with the Building Regulations and further the local authority inspector was liable for failure to ensure such compliance. The court in that case found the builders 75% liable and the authority 25% liable.

In *Torrige District Council and Others v. Turner* (1992) Mr Justice Woolf (as he then was) held that breach of Building Regulations was not a continuous offence and that the proceedings therefore had to be brought within the six month time limit under section 127 of the Magistrates' Courts Act 1980.

2.5 Law of negligence

Summary

The expert may be pardoned for being confused about the evolution of the law of negligence and only left in a state of perplexity as to why the courts have not followed the inventive skill of Lord Atkin who gave the leading judgment in *Donoghue v. Stevenson* (1932) providing the classic definition of the duty of care in the tort of negligence.

Negligence can arise in two areas: firstly where there is a contract between the parties and one acts so negligently in performance of his obligations that it amounts to breach and secondly where there is no such contractual nexus but the 'neighbour' principle expounded in *Donoghue* applies. The niceties of legal argument that arise from this distinction are outside the scope of this work but the law is ably described by John Powell in *Jackson & Powell on Negligence*.

Many construction experts are retained in negligence cases to consider whether a certain professional has fallen below the standards required of his

particular professional discipline. The expert is not asked whether X was negligent but rather asked to comment upon the standards of skill exercised and whether the method and the manner of such exercise was in accordance with the accepted standards of the particular professional (see Chapter 3).

What experts should be aware of merely as background are often seemingly contradictory cases which perhaps make his job more difficult. It is suggested that these are matters for legal debate not for the construction experts. It is more important that he focuses on the professional discipline and technical matters, guided on the general applicable legal principles (so far as relevant) by the lawyers engaged by his client and by the court.

Purely by way of a mere indication the expert may be interested in some cases over the past 30 years indicating the law's evolution in this area. The following is neither a precise summary of the evolution of that complexity nor is it to be relied upon as any substitute for the appropriate and particular legal advice in any given set of circumstances.

In *Dutton v. Bognor Regis Urban District Council* (1972) it was held that a local authority building inspector owed a duty of care to the property owner to point out defective foundations. This case was followed by *Anns v. Merton London Borough Council* (1978) where it was held that since a local authority inspector had inspected the foundations improperly the local authority was liable.

This case was followed by *Batty v. Metropolitan Property Realisations Limited* (1978) where it was held that the builder was liable in damages where it was shown that there had been actual physical damage to the building or there was a present or imminent danger to the health or safety of the occupiers.

In *Junior Books v. Veitchi Co. Ltd* (1983) a specialist nominated subcontractor was held liable in tort to the building owner for pure economic loss caused by defects in the floor which the sub-contractor had laid. Many academics and others have commented that this was the so-called 'high tide' of negligence claims and these cases must rank as the high water mark of 20th century negligence cases to the extent that the *Anns* decision was the most important since *Donoghue v. Stevenson*.

The decision of *Batty* and *Junior Books* can be sharply contrasted with the analytical approach of the Australian High Court taken in *Council of the Shire of Sutherland v. Heyman* (1985) where it was decided that the decision in *Anns* would not be followed and that, as far as the Australian courts were concerned, the local authority owed no duty of care to a subsequent purchaser in respect of defective foundations.

In 1986, whether because of academic argument and debate or because of commercial pressure from the construction lobby, the advance of the law of negligence and tort was halted abruptly by the Privy Council who quite sensibly decided as a matter of policy that in purely commercial transactions the courts should look strictly at the contract between the parties and that that contract should exclusively determine liability.

The *Anns* principle was further attacked in *Leigh & Silavan Limited v. Aliakmon Shipping Co.* (1986), and in *D & F Estates Limited v. Church Commissioners for England* (1988) it was held that a main contractor could not

be liable in negligence for the alleged negligent work of a subcontractor where the loss suffered was pure economic loss.

This case was followed in *Murphy v. Brentwood District Council* (1990) where the House of Lords decided that a local authority was not liable to a property owner for economic loss caused by its negligence in approving an inadequate foundation design. The last vestiges of the *Anns* decision were thus swept away so that very generally speaking the law of contract is decisive in commercial construction cases. The development of the law of negligence affecting construction projects has focused on the liability of construction professionals and public authorities and the recovery of financial or pure economic loss. Where there appears to be some confusion and difficulty is the application of negligence cases to public bodies and professionals alike. It is suggested that public authorities and utilities are much in the realm of public law and, where public interest and public policy are concerned, there may well be a logical explanation for such cases as *Anns v. London Borough Council of Merton* (1978). The judicial difficulty would appear to be in the application of the *Anns* doctrine to professional liability and construction cases. If there is to be a remedy in damages it must be sought under the *Hedley Byrne* principle (see below), by action under a warranty, or under the Contracts (Rights of Third Parties) Act 1999.

Measure of damages

Liability

Damages in tort must arise as a direct result of the breach of duty and have been reasonably foreseeable. Again the damages must not be too remote.

Following the case of *Hedley Byrne & Co. Limited v Heller & Partners Limited* (1964), in which merchant bankers gave written advice by way of a reference to the plaintiffs who relied on such reference and, in doing so, suffered pure economic loss. This was the first time the common law allowed pure economic loss unrelated to physical damage to be actionable in tort. However there does have to be special proximity of relationship between the parties in that the negligent party has to know that the other would be relying on the advice that has been given and that financial loss would be highly likely if that advice were wrong.

Quantum

Some guidance as to how the courts evaluate the question of quantum of damages on the basis of expert evidence will be of interest to the expert.

In *Phillips v. Ward* (1956) the court held that the appropriate measure of damages against a negligent surveyor was the difference between the value of the property as it was described in the surveyor's negligent report and the value as it should have been described. It has been argued many times that

the decision in *Phillips v. Ward* could not be taken as a strict rule but may need some qualification in certain circumstances. Other cases illustrate some of the situations that can arise and question whether the decision in *Phillips v. Ward* can be regarded still as the general rule.

In *Hopkins and Palmer v. Jack Cotton Partnership* (1989) a house was purchased in 1981 by the plaintiffs for £17,400 relying on the defendant's survey. The survey failed to draw attention to cracking in the walls. The market value of the property at the time of purchase was only £12,000. When the purchasers discovered the cracking they were advised by engineers to 'wait and see'. It was not until 1984 that they were advised to take remedial action. Repair costs amounted to £14,000 in 1985, but the purchasers were awarded £14,000 as repair costs rather than a sum calculated on the difference in value principle. The judge said that the plaintiffs' true loss was the cost of the remedial work. The judge seems to have founded his decision on the basis that the plaintiffs acted quite properly and reasonably in keeping the property rather than placing it on the open market as soon as they discovered the defect.

In *Syrett v. Carr and Neave* (1990) a country house was valued at £300,000. Its true market value was £245,000 taking into account a major infestation by death watch beetle and dampness. The defects were not discovered until two years after purchase and the repair costs amounted to £78,000. Judge Bowsher, the Official Referee sitting in what is now the Technology and Construction Court, awarded the repair costs. He held that the difference in value was an inappropriate measure as the purchaser had no reason to make an instant sale of the property because she did not know of the defects until two years after moving in, and by then she was so heavily involved with the property that it was reasonable for her to keep it and repair it.

In *Watts and Watts v. Morrow* (1991) Judge Bowsher took a wider view of what would justify failure to resell. The plaintiffs had purchased a country house only to find that it required extensive repairs costing around £34,000. The difference in value between the property as the surveyor described it, and in its actual condition in need of repair was £15,000. The judge awarded the cost of repair justifying his decision on the basis that, if the plaintiffs had sought to cut their losses by reselling, they would have incurred a very considerable cost in reselling and finding new property. In addition, they might have incurred a very substantial loss on the resale in very different market conditions, and when they were selling what would have become a suspect house they would have had to devote much time to the sale. Again, he found the purchasers in a very difficult position and found that they acted entirely reasonably in deciding to repair the premises rather than resell.

In both the *Syrett* and *Watts* cases Judge Bowsher awarded damages for the inconvenience and distress suffered by the purchasers. In the *Watts* case Judge Bowsher sought to bring the distress award within the class allowed by Lord Justice Staughton in *Hayes v. James & Charles Dodd* (1990) in which it had been held that a prospective buyer of a house goes to a surveyor not just to be advised on the financial advisability of one of the most important

transactions of his life but also to receive reassurance that when he buys the house he will have 'peace of mind and freedom from distress'.

An appeal was lodged by the defendants in *Watts v. Morrow* and the Court of Appeal held that *Syrett* had been wrongly decided and that Judge Bowsher's conclusion on the amount of damages awarded was erroneous. The proper measure of damages was the 'diminution in value'. Lord Justice Ralph Gibson held that the discoverability of the defect was irrelevant to the question of whether the measure of damages recoverable was the cost of repair, or the diminution in value (although he did reserve his opinion on the date at which the diminution in value was to be calculated). Diminution in value was therefore the appropriate measure in *Syrett* as well as in the *Watts* case.

With regard to the damages awarded for distress and inconvenience by Judge Bowsher, their Lordships came to the view that the award of £4,000 to the plaintiffs was too high and revised the awards down to £750 to each plaintiff, stressing the point that courts will only award 'modest' sums in respect of this head of damage.

Limitation and damage

Patent damage is damage that must be capable of being readily seen, inspected and diagnosed, e.g. spalling concrete, cracking, rising damp or condensation through lack of adequate ventilation. Latent damage, on the other hand, is that damage which has not developed or is not manifest but hidden from view and only sometimes detectable from scientific testing or thorough analysis. It is not defined in the Latent Damage Act 1986.

The law requires that there be a direct causal connection between defect and damage and experts sometimes find the greatest difficulty in proving latent defects. The expert must appreciate this point when addressing the question of defects and damage in his report, and generally when he advises how extensive testing and sampling should be.

The importance of damage being either actual or latent is not just a question of extent but also one of timing, i.e. when did the damage occur? Technically, it may be important in considering what redress or remedial works are necessary. Legally, it is critical as to whether an action or claim may be brought in respect of that damage. Once again, although a legal matter, the expert must address his mind to its significance and seek legal advice as necessary.

So far as claims are concerned, the limitation period for actions in tort and contract differ.

Torts

Section 2 of the Limitation Act 1980 provides that a party may commence an action in tort within six years of the date of accrual of the cause of action

(right to sue). In negligence claims the cause of action accrues when the damage occurs. When the damage occurs is a question of fact in such cases; *D W Moore & Co. v. Ferrier* (1988).

Contract

Section 5 of the Limitation Act 1980 provides that the time for an action founded on simple contract is six years from the date on which the cause of action accrues (or in the case of a contract by deed the period is 12 years). The cause of action accrues on the date of breach.

Latent Damage Act 1986

To understand this statute it is worth reflecting that by the close of the 19th century a claimant could take action in court proceedings only if they were brought within the limitation period. In tort this was satisfactory since the date would be obvious, when the damage or injury occurred. In contract the period ran from the date of breach. But when does a breach arise with reference to a building contract where there is defective work? Claimants were barely protected by 'fraudulent concealment' provisions. The Limitation Act 1963 provided for a weak discoverability test supported by the Court of Appeal's decision *Sparham-Souter v. Town and Country Developments (Essex) Limited* (1976). In 1983 the House of Lords, in *Pirelli v. Oscar Faber & Partners* (1983), reached the conclusion that the date of the accrual of such causes of action in construction contracts should be the date of first physical damage, and not, as formerly believed, when the plaintiff knew or ought reasonably to have known of the damage to the building. Just how a claimant could detect 'first physical damage' is hard to understand. Their Lordships relied upon Parliament rescuing them and the Latent Damage Act was passed as a result of the House of Lords decision.

The Act provided that in cases of tort the limitation period extended for a period of three years from the date of knowledge. There is a cut-off period of 15 years from the breach of duty, if this expires first – known as the long-stop – or otherwise whichever is the later of six years from the date of accrual of the right to sue (occurrence) or three years from the date of knowledge (discoverability).

'Knowledge' was defined in the 1986 Act to include knowledge from facts observable by the claimant, or from facts ascertained by him with the aid of appropriate expert advice which it is reasonable for him to see, i.e. knowledge available to the claimant and/or his experts.

But as with all such political 'fixes', they rarely achieve their ends. So that as between Parliament and the courts it is very difficult to reconcile a solution where claimants/owners are provided with a remedy at common law in *Anns* only to have it abolished in *Murphy v. Brentwood District Council* (1990) and then for Parliament to enact legislation for which there was little need, if any, following the decision in *Murphy*.

Chapter 3

Professional Liability and the Expert Witness

3.1 *The expert's role*

In general terms there are two aspects of professional liability of concern to the expert:

- (1) the extent to which the expert may advise on the breach/breaches of the appropriate professional standard of care in contract and tort; and
- (2) the degree and standard of care that the expert himself must observe in carrying out his duties in contract and in tort.

It is not for the expert witness to advise a client on matters of law. Whether a particular person is in breach of his particular duty or obligation in contract or tort or by virtue of some statutory provision is a matter for lawyers and often, in difficult borderline cases, for leading counsel. Breach of duty is a professional and a legal matter and must be treated with the attention and seriousness it deserves.

Within this context, however, the expert in many cases will have to advise as to whether X or Y fell below the professional standard that he ought to have exercised. He is permitted to give his opinion as to how and why a particular professional may have been in breach of his professional duty in relation to his professional standards. The expert must be careful not to go outside his expertise or his role and he must confine himself to the effects of the case and give his opinion within the terms of his appointment or briefing. It may be helpful if the expert appreciates the context in which his opinion may be placed, and it is in this sense, and only in this sense, that the following brief résumé, by no means exhaustive, of the law is presented.

3.2 *Contractual liability*

Professional liability in contract is determined by the terms of the contract itself. Terms may be express or implied.

Implied terms

Where a professional person is required to enter into a contract in order to provide professional advice, the courts do not imply any terms that that

advice is correct. The courts take the general view that most of the tasks required to be undertaken by professional men must be undertaken with reasonable care. In a contract for the supply of a service where a supplier (a person who agrees to carry out a service) is acting in the course of his business, there is an implied term that the supplier will carry out the service with reasonable skill and care (section 13 of the Supply of Goods and Services Act 1982).

Express terms

Rather than relying on implied terms, it is normal to find in contracts for professional services and in warranties express terms stating that the professional will use the appropriate standard of skill and care. A typical example is that given in Marshall Levine's *Construction and Engineering Precedents* (Sweet & Maxwell 1998):

The consultant warrants and undertakes to the purchaser/tenant/funder that it has exercised and will continue to exercise all reasonable skill care and diligence which may reasonably be expected of a professional person acting in the capacity of the consultant in relation to...

Exclusion of liability

Where the appointment or contract purports to exclude liability for negligence the courts will, upon application, intervene to determine the extent and validity of such exclusion. Section 2 of the Unfair Contract Terms Act 1977 provides limitations on such exclusions. The Act applies to consumer contracts and those contracts based on standard terms.

Where the commercial bargaining power is equal between the parties then the courts will not generally intervene respecting the parties' freedom to apportion risk between themselves as they see fit. This was the effect of Lord Wilberforce's judgment in *Photo Production Ltd v. Securicor Transport Limited* (1980) which overruled Lord Denning's notion of fundamental breach bringing exclusion clauses to an end.

Limitation

Appointments may be in writing or by deed. If in writing then the limitation period during which a party to a simple form of contract may make a claim is six years from the date of breach. The right to sue takes effect at the date of the breach of the contractual obligation, as distinct from an action in negligence where time runs from the date the damage occurred. There is therefore an obvious procedural advantage in drafting a claim in tort, so having the benefit of an extended limitation period.

However the measure of damages differs in tort which may or may not be to the claimant's advantage and the case can be more difficult to formulate. The usual practice, if both options remain open, is for the claimant's counsel to protect his client's position by formulating the claim 'in the alternative', pleading both breach of contract and tortious liability. This means that if there is a defence to one aspect of the claim or it otherwise fails the other might still succeed.

3.3 *Non-contractual liability*

One of the most complex problems an expert will have to deal with is the tort of negligence. It is a wide area and, as Lord McMillan once said, 'The categories of negligence are never closed.'

In law, actionable negligence is breach of a duty of care which results in damage which is not too remote a consequence of the breach. The essentials of the tort of negligence therefore are:

- (1) the existence of a duty of care;
- (2) the breach of that duty;
- (3) damage which is not too remote a consequence of the breach.

The duty of care in negligence is owed generally to neighbours. In the leading case of *Donoghue v. Stevenson* (1932) Lord Atkin defined 'neighbours' as:

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In *Bourhill v. Young* (1943) Lord Wright said that Lord Atkin had 'established a general concept of reasonable foresight as the criterion of negligence'.

Damage is a difficult area. It is not so straightforward as some would suggest, but as a general guide the following categories are recognised at law as within the ambit of actionable damage:

- (1) damage to property;
- (2) personal injury;
- (3) imminent threat to health and safety;
- (4) economic loss arising from breach of professional duty (see *Hedley Byrne v. Heller* (1964) below).

3.4 *Advising on breach of duty by professionals*

The expert may be instructed by the solicitor to consider professional standards and whether any person/persons may have fallen below the standard

required in respect of a particular professional discipline. In considering these he will refer to professional codes of practice or conduct, technical authorities, recent papers published on the subject and standard text books, as well as considering what a reasonably competent person in his profession would be required to do. He will also consider the 'state of the art' as it was at the relevant time.

He will consider these aspects in his initial appraisal to the solicitor so that the client can be advised of the potential liability of the professionals involved. The expert must be careful to address the report to the solicitor because it will then be subject to legal professional privilege as a document received by the solicitor for the purposes of advising his client.

The duty

The following cases are offered as examples to the reader of how the courts have considered the various professions and the duty which members of such may owe to persons other than their direct clients. The examples are not exhaustive. Each case depends on its facts. Although guidance may be given, the expert must consult with his client's legal advisers in considering the conclusions which has reached as to the standards to be inferred from the evidence presented.

The leading authority from the professional's point of view is *Hedley Byrne v. Heller and Partners* (1964) (the leading case on professional misstatement). In this case bankers were asked about the financial stability of a customer of the bank. They gave a favourable reference, albeit with a disclaimer of responsibility. The circumstance of the enquiry made it clear to the bankers that the party on whose behalf the enquiry was made wanted to know if they could safely extend credit to the bank's customer in a substantial sum. Acting on the reference given, the plaintiffs extended credit to the bank's customer who in due course defaulted. The House of Lords held that in negligence, misrepresentation, though honest – spoken or written – may give rise to an action for damages for financial loss (pure economic loss) quite apart from the existence of any contract or fiduciary relationship. The essence of their Lordships' opinion was that the law will imply a duty of care when a party is seeking information from a party possessed of a special skill and trusts him to exercise due care, and that party knew or ought to have known that *reliance* was being placed upon his skill or judgment.

In 1989 the House of Lords heard the two appeals of *Smith v. Eric S Bush* and *Harris v. Wyre Forest District Council* where the plaintiffs in both cases were house purchasers who purchased in reliance on valuations of the properties made by surveyors acting for and on the instructions of mortgagees. In both cases the surveyors' fees were paid indirectly by the plaintiffs, and in both cases it turned out that the inspections and valuations had been negligently carried out. The properties were seriously defective so that the plaintiffs suffered financial loss.

In the case of *Smith*, the mortgagees were a building society, the surveyors

who carried out the inspection on valuation were a firm employed by that building society and their report was shown to the plaintiff. In the case of *Harris*, the mortgagees were the local authority who employed a member of their own staff to carry out an inspection on the valuation. His report was not shown to the plaintiff but the plaintiff rightly assumed from the local authority's offer of a mortgage loan that the property had been professionally valued as worth at least the amount of the loan.

In both cases the terms agreed between the plaintiff and the mortgage purported to exclude any liability on the part of the mortgagee or the surveyor for the accuracy of the valuation. The House of Lords held that in both cases the surveyor making the inspection and valuation owed a duty of care to the plaintiff house purchaser and that the contractual clauses purporting to exclude liability were struck down by virtue of section 3(2) and section 11(3) of the Unfair Contract Terms Act 1977.

The significance of these cases was that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation. The defendant knew that the advice or information would be communicated to the plaintiff directly or indirectly and knew that it was very likely that he would rely on that advice or information in deciding whether or not to engage in the transaction he contemplated.

The question of reliance was also addressed in *Caparo Industries plc v. Dickman* (1990). In considering this difficult question, their Lordships considered two previous decisions.

The first decision was that of *Al Saudi Banque v. Clark Pixley* (1989). In this case Mr Justice Millett held that the auditors of a company owed no duty of care to a bank which lent money to the company (regardless of whether the bank was an existing creditor or a potential one) because no sufficient proximity of that relationship existed in either case between the auditor and the bank.

The second case was that of *Twomax Limited v. Dickson, McFarlane and Robinson* (1982) where the Lord Ordinary held that auditors owed a duty of care to potential investors, who were not shareholders, by applying the test of whether the defendants knew, or reasonably should have foreseen at the time the accounts were audited, that a person might rely on those accounts for the purpose of deciding whether or not to take over the company and therefore would suffer loss if the accounts were inaccurate.

In considering the above authorities their Lordships came to the conclusion in *Caparo Industries plc v. Dickman* that the purpose of the auditors' statutory duty to prepare accounts of a public company was to enable the shareholders, as a body, to exercise their interest in the general management of the company's affairs, and not for the purpose of individual speculation with a view to profit. Accordingly, the auditors' relationship with individual shareholders did not give rise to any duty of care to shareholders as potential purchasers of shares in the company. Shareholders who, relying on negligently prepared accounts, purchase shares and suffer, have no claim in negligence against the auditors.

Caparo has been further considered in *James McNaughton Papers Group Limited v. Hicks Anderson & Co* (1991) where the Court of Appeal decided that the target company's accountants had not owed the bidder a duty of care in respect of draft accounts prepared for use by the target company in a takeover negotiation. However, distinguishing *Caparo* in *Morgan Crucible Co v. Hill Samuel Bank Ltd* (1991), the Court of Appeal held that if, during the course of a contested takeover bid, the directors and financial advisers of the target company made express representations after an identified bidder had emerged, intending that the bidder would rely upon those representations, then they owed the bidder a duty of care not to be negligent in making representations which might mislead him.

Caparo and Smith v. Eric S Bush (1989) were applied in *Al-Nakib Investments (Jersey) Limited v. Longcroft* (1990) where Mr Justice Mervyn Davies held that company directors did not owe a duty of care to shareholders or anyone who relied on a prospectus published for the purpose of a rights issue when purchasing shares in the company through the stock market.

The standard

The expert has been given above some examples of how certain professional persons may owe a duty of care. The duty never varies, but the standard of care does, depending upon the particular skill of the person involved.

The general rule is that a professional person must exercise a reasonable degree of care and skill, a formulation expressed by Mr Justice Tindall in *Lanphier v. Phipos* (1838). The general test applicable is an objective test referable to what Mr Justice Graham, in *Andrew Master Homes Limited v. Cruikshank & Fairweather* (1980), referred to as 'the notional member of the profession and not a subjective test referable to the particular professional man employed'.

The expert is entitled to form an opinion based on the facts and technical authorities as to whether a professional has fallen below the ordinary standard of care required. It is for the lawyers to advise as a matter of law whether there may be a case worth pursuing by way of litigation or arbitration. A decision to proceed is not to be made by the expert witness and it may not be made by the lawyers. It is a decision that the client, having received the appropriate technical and legal advice, must make himself.

A good definition of the professional duty is that described Mr Justice McNair in *Bolam v. Friern Hospital Management Committee* (1957) as being:

The standard of the ordinary skilled man exercising and professing to have that special skill.

This test has been approved by the Judicial Committee of the Privy Council in *Chin Keow v. Government of Malaysia* (1967). Further elaboration of the test was given by Lord Diplock in *Saif Ali v. Sydney Mitchell & Co.* (1978) where he said:

No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well informed and competent member of that profession could have made.

The difficulties where there are alternative views within the profession concerned were explored in *Maynard v. West Midlands Regional Health Authority* (1985) and the *Bolam* test has recently been qualified by the Court of Appeal in *Bolitho v. City and Hackney Health Authority* (1997) by adding the requirement that the court must be able to satisfy itself that the opinions of experts have a logical basis.

[T]he court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice ... The use [in *Bolam* and *Maynard*] of these adjectives – responsible, reasonable and respectable – all show that the court has to be satisfied that such opinion has a logical basis.

Faced with an opposing view the expert can only present his own considered opinion as clearly and objectively as possible, acknowledging and explaining the divergent views that may be held. He should, however, at an early stage expound fully on these different opinions, playing 'devil's advocate' as explained in Chapter 1, so that the client and his legal advisers can carefully weigh the risks of proceeding with litigation or arbitration.

Damages

Quantification of damages can be a straightforward matter for a quantity surveyor or similar with the appropriate expertise. However the principles on which damages are awarded, which differ between contractual claims and those in tort, and the fine distinctions between, for example, physical damage and pure economic loss are matters for legal experts. What is set out below is only a brief summary. Specialist texts and journals as well as legal advice should be consulted for the detail and more recent developments.

In *Murphy v. Brentwood District Council* (1991) a subsequent purchaser of property claimed that the local planning authority were negligent in passing building plans for its construction. Foundations cracked, walls were damaged and pipes were broken. It was held at first instance that this was damage causing injury to the claimant's health and safety. The House of Lords held, however, that the damage was not actionable at law because this damage was discovered before any injury to person or property was caused: the local authority was not liable. This was undoubtedly a decision as much influenced, no doubt, by judicial and public policy as by analysis of law, but remains binding authority.

It is suggested that the dividing line between what is physical damage and what is pure economic loss may be difficult to reconcile, especially for those who have experience whether as home owners or employers of defective building works. If a pipe leaks it may be capable, if not repaired, of flooding the premises and causing damage to 'other property'. If a wall cracks and there are structural failures surely such must rank as 'damaged'. It seems that in this area the judges could learn much from the science of civil engineering. It is time the law in this area was clarified tilting the balance perhaps more towards the consumer's/client's interest rather than perhaps being perceived at present as protecting powerful commercial construction interests.

Parliament may well need to reconsider the interests of the public in this context, consider whether the Defective Premises Act is sufficient and revisit this area of law. If one can succeed in damages for breach of contract for pure economic loss why does the law not impose protection in tort for the ordinary home-owner or tenant who suffers loss and damage in terms of economic loss when such economic loss is the cost of rectifying defective building works? The law of negligence in this respect from a public policy point of view would seem hard to justify to the man in the street for whose benefit the common law, according to Lord Denning, evolved; but then again, as Lord Denning said, it is a question of getting the balance right, and that balance, as the cases following illustrate, has changed and may change further.

Whilst there may be some injustice in favour of commercial parties as compared to the ordinary building or home owner the expert must appreciate the state of the law as it is and be advised accordingly. An understanding of the development of the law of tort may well assist the expert in understanding the legal side of the client's case. The analysis of the economic loss argument developed by the authors of *Jackson and Powell* may be of assistance. They considered that the core of the modern exclusionary rule concerning the recovery of economic loss in negligence depended on three House of Lords authorities:

- *D & F Estates Ltd v. Church Commissioners for England* (1989)
- *Murphy v. Brentwood District Council* (1991)
- *Department of the Environment v. Thomas Bates and Son* (1991)

It was said that:

- (1) the recovery of the 'pure economic loss' goes beyond existing decisions based on *Donoghue v. Stevenson*;
- (2) there are policy reasons for not allowing such extension; and
- (3) the courts should not intervene in an area where Parliament has legislated.

Against such weighty authority it would be difficult to envisage any change in these precedents, yet it must be said that the kernel of these decisions is

based on public policy. In terms of the liability in negligence of public authorities for their servants, it was politic to stem the tide of actions for negligence against such authorities because of the obvious escalating burden on the taxpayer. However anyone who has read the biography of Lord Atkin might consider such decisions so reliant on policy to be weak. Sometimes the principle of law is a better standard than policy.

In practice there may be a particular difficulty in deciding how the 'pure economic loss' can be classified as damages when the economic loss itself is caused by damage, i.e. defective building work (whether dangerous or not) which may of itself inevitably cause further damage to other property or injury which may be a matter for expert analysis.

The dissenting judgment of Lord Brandon in *Junior Books Limited v. Veitchi Co. Limited* (1983), a case distinguished as being decided on its particular facts, seems to have some overtones of Lord Atkin's courageous quest for an answer to different but analogous situations. Lord Brandon's words are interesting:

It has always been stated, either expressly or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger of physical damage to persons or the property, excluding for this purpose the very piece of property from the defective condition of which such danger or threat of danger arises.

The question that does not seem to have been put is perhaps the most obvious – why exclude the very piece of property that is defective and which may have caused the pure economic loss, and which may cause other damage, such diminution in value or structural failure, or injury to the occupiers or lawful visitors or neighbours? In such context the building owner is currently outside the protection of the law of torts.

3.5 The expert's own professional liability

Just like any other professional person the expert may be liable in tort or contract for breach of his duty to his client.

Contractual obligations

Express obligations

These are dependent upon the express and implied terms of the expert's brief or letter of appointment or any contract for professional services. He may be liable:

- for breach of a duty to exercise the requisite degree of skill and expertise required in the particular case;

- for failing to carry out instructions and properly report to the client or solicitors;
- for failing adequately to carry out investigations;
- for failing to advise the client of any necessary steps (such as seeking additional specialist advice) or taking remedial action as soon as reasonably practicable – subject to the client seeking appropriate legal advice.

He may also be liable if he exceeds the scope of his instructions, e.g. attending experts' meetings without authority and settling the case for a figure in excess of the limits placed upon him by way of his instructions or beyond the scope of his advice to the client. The reader is referred to the judgments of Judges Fox-Andrews and Newey regarding the scope of the expert's authority and without prejudice meetings in Chapter 7.

Implied statutory obligations

Section 13 of the Supply of Goods and Services Act 1982 provides that:

In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

For the expert this means, in effect, that he has a duty as the supplier of a service to carry out that service with reasonable skill and care. This is commensurate with the duty of care and skill required in the law of tort, and if the expert has not exercised such reasonable care and skill he can additionally be found liable for breach of that implied term.

The expert must also be wary of time factors. The Supply of Goods and Services Act 1982 also implies a term about timely performance. In section 14, the Act provides:

- (1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.
- (2) What is a reasonable time is a question of fact.

In other words the expert must be minded to be careful about producing advice and reports within a reasonable time if no specific time is laid down by those instructing him. If, for an extreme example, a civil engineer is required to give advice as to the safety of a structure, fails to produce a report within a matter of weeks, rather than months, and at the end of e.g. a four month period, the structure fails, then the expert may be found to have been unreasonable in performing his service for the client.

Obligations in tort

The expert's duty of care in negligence is the same as any other professional adviser save that an expert will have certain additional functions and responsibilities.

The construction expert and indeed other professionals will be judged according to the relevant standard of care, i.e. the special skill or expertise that the expert (professional man) professes. The expert cannot claim judicial immunity in these matters. The expert is not a judge. He does not exercise a judicial, arbitral or quasi-arbitral function.

The position was made very clear in *Sutcliffe v. Thackrah* (1974) and in *Arenson v. Casson Beckman Rutley & Co.* (1975) that neither architects, as in *Sutcliffe v. Thackrah*, nor valuers, as in *Arenson v. Casson*, occupied the position of a quasi-arbitrator. The submissions presented to their Lordships in the *Sutcliffe v. Thackrah* appeal to the House of Lords by Donald Keating QC were subsequently adopted by their Lordships and indeed confirmed by Lord Wheatley in *Arenson v. Casson*.

In *Campbell v. Edwards* (1976) Lord Denning MR said:

the expert does not act in any arbitral or quasi-arbitral capacity and consequently has no immunity from suit on that basis.

In *Palmer v. Durnford Ford* (1992) Simon Tuckey QC sitting as a deputy judge of the High Court held that an expert witness could not claim immunity from suit by his clients for his actions in the course of preparing evidence for claim or a possible claim.

Expert witnesses have a distinctive role and function which must not be confused with expert determination or any other ADR process or statutory adjudication under the Housing Grants Construction and Regeneration Act 1996 which is outside the scope of this text. For a fuller discussion on expert determination see John Kendall *Dispute Resolution: Expert Determination*, but in brief where an expert acts as simply as an 'expert' to determine a dispute then he is not liable for the decision he gives and there can be no appeal. If, however, he answers a different question from that referred he may be liable.

Standard of care

Should the expert witness owe a higher duty of care to the client than a professional practitioner? It is submitted that the relevant standard is that of the ordinary competent and skilled practitioner experienced in the type of expert witness work that the professional undertakes and no more than that. In other words that which would be the standard expected of an expert witness professing the relevant knowledge and skill and practising in that type of expert witness work.

Limiting the expert's responsibility

Experts must take special care when preparing reports and statements of opinion on the liability of those whom they may criticise. This book outlines in Chapters 7 and 10 guidelines for experts who prepare reports in construction cases. Experts should have a working knowledge of the procedure with reference to Part 35 of the CPR 1998 and the accompanying Practice Direction, as well as an understanding of Part 49C and Practice Direction 49C for working in the Technology and Construction Court. Experts are also advised to familiarise themselves with the TeCSA Expert Witness Protocol, the Draft Code of Guidance for Experts and any protocol for expert witnesses as approved by the court. (See Appendices.)

What the expert ought to bear in mind when giving advice or writing reports is that the principle of liability for negligent misstatement (*Hedley Byrne v. Heller* above) applies equally to his own position, where he is called in as a consultant to advise on, for example, defects in a building and necessary remedial works. If the expert has any doubts about his advice it is suggested he should expressly declare

- that the advice is based on restricted or limited information;
- that his report is subject to further investigation or enquiry;
- that insufficient evidence has been made available to him; or
- that he feels that the client should not place greater reliance on his advice until further information has been obtained or even a second opinion obtained.

Any such reservations should be clearly and expressly stated qualifying the report and its status.

However there can be no certainty that the qualifying words will exclude liability for negligence unless the court is satisfied that the exclusion itself was fair and reasonable in all the circumstances. In *Smith v. Eric S Bush* and *Harris v. Wyre Forest District Council* (1989), despite the purported exclusion of liability in the respective reports as to the accuracy of the information, both exclusion clauses (disclaimers) were struck down by section 3(2) and section 11(3) of the Unfair Contract Terms Act 1977. This Act is most important in considering the extent to which disclaimers or restrictions on liability may be made.

The court has to consider whether it would be fair or reasonable to allow reliance upon the exclusion or restriction having regard to all the circumstances. A clause excluding liability altogether would probably be unreasonable. A limitation clause, however, restricting the depth of the expert's activity might be acceptable.

In response to Lord Woolf's inquiry the Courts and Legal Services Committee of the Law Society drafted a Code of Practice which provides that experts should make clear to solicitors what can and cannot be expected on completion of their assignment. In particular they should identify to the solicitors instructing them what areas they are not qualified to deal with or

upon which they would want further information or guidance.

The Draft Code of Guidance Under the Civil Procedure Rules 1998 (see Appendix VI) likewise includes a provision:

10. It is the duty of experts:

- a. i) in the case of advice to explain to those instructing them both the strengths and weaknesses of the parties' cases;
- ii) to explain in their reports to the court the range of opinion as required by Practice Direction 1.2 (5).

The fact that experts' instructions must be set out in their reports would seem to benefit both the expert and the client in ascertaining precisely the scope of the expert's brief and duties.

Any restriction or limitation defining the scope of the expert's services may operate as a warning giving notice to the client that the expert may not be liable for breach of duty to exercise reasonable care or skill or place reliance upon certain aspects to which the warning may relate. In all cases the liability of the expert in such respects is subject to interpretation and proper construction of his appointment, terms of reference, and any restriction, limitation or qualification in his advice or report.

Where an expert is asked to comment on the standards of another professional person it is practice to retain an expert of the same discipline, e.g. an architect to comment on an architect's design. (See *Worboys v. Acme Investments* (1969)).

Chapter 4

How the Courts Evaluate Expert Evidence

Only those who have attained a recognised expertise and standing in their profession should be called upon to act as experts. The task is a daunting one for the expert who has no witness or court experience. He may therefore be a good technical expert in his profession, but prove a poor witness when giving evidence in court. This can be overcome by practice, by recognising some of the pitfalls that face the expert giving evidence, and by preparing the case as thoroughly as possible.

Some of the positive attributes and characteristics of experts have already been noted. But how do such qualities assist the expert in practice in giving his evidence, and how do experts appear in the eyes of the court? It is clear that the expert must have an analytical mind, objective judgment, recognition of the merits of the case, patience, fluency, tact, coolness under pressure and a thorough grasp of the details of the case. His aim should be to be positive whenever possible, but this should not lead him to compromise his objectivity, and he should acknowledge where the evidence is weak. An expert who presumes to know all the answers when clearly he cannot, or contradicts something he has written or said previously or presumes to place himself in the seat of judgment may not make a very reliable witness.

Some lessons may be learned from how certain successful experts have achieved this objective in court.

The evaluation, however, must be set in the context of the criteria adopted by the courts although it is not the function of this text to explain all the criteria that courts may apply when evaluating expert evidence. That would be presumptuous. The judge is the master of the management of the case and the admission of evidence. Each case is decided on its particular facts and expert evidence evaluated by each judge applying the principles of the laws of evidence, the Civil Procedure Rules and exercising his discretion. Respect must be paid to the overriding objective of the new procedural code and the recommendations that were made by Lord Woolf who has made an outstanding contribution to civil justice in this respect.

4.1 The overriding objective

The overriding objective of the Civil Procedure Rules 1998 set out in rule 1.1 is to enable the courts to deal with cases justly; this involves ensuring each case is dealt with expeditiously and fairly. Rule 35.3 (1) CPR 1998 provides

that the duty of an expert is to help the court on the matters within his expertise as witness. It is important for experts to understand why this duty has been expressed in the rules in an adversarial system where each side has to plead its case. It is a reasonable assessment to say that the balance in English civil litigation has changed. The balance of power is no longer in the exclusive domain of the parties or their counsel but is in the judge's control. Why this shift? Why change the pattern that has existed at least since the Judicature Acts of 1873–1875? The reason is to be found in Lord Woolf's Final Report.

Firstly upon the evidence and submissions his inquiry received he concluded (Chapter 13) that expert evidence and discovery were two of the main generators of unnecessary costs in civil litigation. That contention was not seriously challenged. Probably no analysis of any taxation (the former term for assessment of costs) would have proved to the contrary.

Lord Woolf identified a 'large litigation support industry that goes against all principles of proportionality and access to justice to the extent that many litigants are dissuaded from pursuing their legal rights by action in court.' That people were reluctant or unable to pressure their legal rights could be seen as a social ill akin to the evils of civil procedure identified by the English jurist Jeremy Bentham two centuries ago.

Lord Woolf found on the evidence of his inquiry (which included construction cases) that experts sometimes assumed the mantle of the partisan or advocate of the parties instead of being neutral fact finders. It may well be that in the construction industry, with its proliferation of 'claims experts', such experts are by nature and experience adversarial because of the diverse interests of employer and contractor.

What Lord Woolf and his colleagues appreciated perhaps more than any other civil justice inquiry was the relationship between law and economics. The system of justice on the merits which survived for 125 years was plagued by satellite litigation and much procedural wrangling. The new rules are aimed at avoiding that difficulty and simultaneously producing a more balanced system, fairness and proportionality being the key factors. Overall cost nevertheless remains a problem. The social dilemma that the rules do not address is whether it is fair for a person to mortgage or remortgage their property to take legal proceedings. The case of *Saigol v. Cranley Mansions Limited and Others* (1999) (see Chapter 7 and Appendix VII) is a stark example of the problem that must still be addressed. Even where commercial litigants are concerned, in particular construction companies themselves, one would very much doubt if litigation is perceived as anything but a last resort when all possible means of negotiation, ADR and adjudication have failed to produced a final resolution of major value issues.

Lessons from the Woolf Inquiry

It may be helpful to summarise the findings of Lord Woolf affecting experts and his recommendations as follows:

- (1) There cannot be justification for the non-disclosure of experts' findings or reports which may be damaging to the party's own case or advantageous to that of the opponent. This may seem hard to swallow and a contradiction of loyalty to the client, but what is suggested is that such non-disclosure can prolong cases and sometimes lead to an unfair result. In other words it is time to come clean and put your cards on the table.
- (2) In the past there may have been an imbalance by one side, through chance or with a deeper purse, better quality assistance.
- (3) There should only be one expert on each side if the court considers that expert evidence will assist and no more than one expert's evidence will be admitted unless more is necessary for a real purpose.
- (4) The courts now have complete control over the admission and use of expert evidence and no expert evidence may be adduced without leave of the court.

These have been put into effect in the CPR, particularly Parts 33–35, in that there are options for limiting the scope of expert evidence. The court can:

- direct that no expert evidence is adduced at all, or there be no expert evidence of a particular type or on a particular issue;
- limit the number of experts;
- direct that evidence be given by expert(s) chosen by agreement between the parties or from a list prepared by the parties or otherwise as the court may direct.

PD35 (the Practice Direction on Experts and Assessors) provides at paragraph 5 that where the court has directed that the evidence on a particular issue is to be given by one expert only but there are a number of relevant disciplines, a leading expert in the dominant discipline should be identified as the single expert.

Single joint experts

Single joint experts may be acceptable in a certain limited range of cases. Anyone reviewing the numerous cases referred to adjudication under the Housing Grants, Construction and Regeneration Act 1996 cannot be in much doubt that, if an adjudicator (who is said to assume a role akin to an expert determiner) can deal with complex factual construction cases and give his opinion by way of decision to the parties, why cannot a single joint expert do the same in court? His opinion is not the decision of the judge and is purely advisory.

The idea of a single joint quantum expert in particular is something that construction litigants should take seriously. In each case each side should put forward lists of quantity surveyors who would be eligible to give expert evidence. If the parties can agree on a single joint expert even if only on this issue then time and costs will inevitably be saved.

Possibly the best argument in favour of a single joint expert is that he can still give a range of opinion and is more likely to do so. The particular difficulty identified by Lord Woolf with the traditional system is that experts on each side take up extreme positions. It may be that this is because the English expert witness has been perceived as the paid agent/employee of one side, instructed by one side, and having only seen the evidence on one side so there has been an obvious imbalance. That balance is now changing.

4.2 *Illustrative cases*

Despite the change in emphasis arising from the Woolf Inquiry and the new CPR, certain principles governing expert evidence remain unchanged and there follows some close consideration of cases that illustrate these points.

Thoroughness in preparing evidence

The first case taken to illustrate the quality of thoroughness in expert evidence is that of *Imperial College of Science and Technology v. Norman and Dawbarn* (1986). The legal issue in the case was limitation; when the cause of action arose and when the damage occurred. The question was determined on the evidence of what constituted relevant and significant damage, and when did it first occur.

The action was brought following displacement of 80 ceramic tiles forming part of the cladding of a 12 storey block at Imperial College in Kensington, London. Proceedings were instituted against both architects and contractors in May 1978 following the discovery of damage in 1977. Although originally pleaded in the alternative of contract and negligence, only allegations of negligence for bad design and lack of supervision were pursued against the architects. They defended themselves by pleading that the damage had been caused by settlement of the structure and that the claim was statute-barred. Action against the architects was subsequently discontinued.

The displaced tiles were manufactured in Sweden. They had grooved backs, providing an excellent key. They were waterproof and frost resistant but prone to slight thermal movement. The tiles were spaced a quarter of an inch apart and grouted, but the grout was not waterproof. The mortar bed, the rendering and the substrata were prone to thermal and moisture movement substantially greater than the thermal movement of the tiles.

During the course of the works at Imperial College detailed records were kept by the clerk of works. He was concerned that the surface of the concrete beams and mullions should be so treated as to provide an adequate key to the render and that layers of render should not be of excessive thickness, that each coat should have time to dry and should likewise provide an adequate key, and that the line of concrete should be in accordance with the drawings, so that the render should be neither unduly thick nor unduly thin and the

tiler therefore have adequate room to affix properly the tiles relative to the line of the vertical column. The clerk of works was not satisfied with the plasterers and complained on numerous occasions of excessive thickness of render.

Expert advice was obtained on site from the manufacturers of bonding agents and the Building Research Establishment was consulted. The clerk of works noticed hollowness in the tiles on numerous dates in 1961.

The College took possession of the high block in July 1962. No practical completion certificate was issued. The final certificate was issued in December 1968.

In 1976 a survey of hollow tiles was carried out and the problem was found to be extensive. Test panels received remedial treatment in 1977 but in October of that year fell off at level eight.

In November 1977 Building Research Advisory Services advised the College that reinforced concrete substrates had shrunk upon drying out; cement renderings had shrunk unevenly and the structural concrete was too smooth for renderings and often inadequately prepared; the ceramic materials had undergone low, irreversible expansion with moisture in the early years of their life cycle; mixed backgrounds caused complications because of differential movements of components, and solar heat had produced large reversible forces in surface membranes. The result of all this had weakened the bond of the tiles, but (more alarmingly), Building Research Advisory Services reported the existence of 'reversible strains because of the lack of overall restraint in the centre and the reduced thermal capacity of the newly separated lamina'. The consultants continued to advise the College but in 1978 an independent expert was brought in. Assisted by a colleague, this expert put forward two alternative suggested remedial schemes, the more expensive of which was adopted. Additionally he prepared an encyclopaedia of information indicating not only precise areas of hollowness detected by a meticulous coin-tapping survey in June 1983, but listing in great detail, as the hollow tiles were removed, the nature and condition of the substrates and of the render and mortar bed immediately behind the tiles.

In his judgment Judge Smout said that, when he made a site inspection before the trial in February 1984 before any remedial work commenced, he noted that several areas of tiles, which sounded hollow when tapped, were extremely difficult to prise off the wall, with or without mortar or render attached, even by a skilled operative with a powered automatic chisel. He also went on to consider the possibility that shrinkage and creep of the concrete tiled frame would have had a pincer effect on the rendering, forcing the rendering and anything attached to it to bow out. He also considered the likelihood of subsidence of the foundations following the hot summer of 1976, which reduced the water table beneath the site. He decided that if shrinkage and creep had been major factors, then one would have expected marked signs of failure much earlier than 1977. He found that subsidence of the foundations was not proved and found that the best evidence was the specimens of tiles that had come from the buildings.

The evidence from the tiles themselves was significant. One of the tiles that fell in October 1977 had been mostly covered by mortar on the back. However, two distinct voids in the back showed where the underside of the tile had not been buttered. One void was approximately two inches by half an inch, another approximately one inch by a quarter of an inch. On another part of the back, the render attached to the mortar sloped sharply and smoothly away to show an area of approximately two inches by one inch, which could never have been in close contact with the substrata. The voids indicated a lack of adhesion when the tile was fixed, despite the fact that it remained in position for 25 years. There was a failure between the render and the substrata. The judge also noted a pronounced pattern of black lines, not only in that tile but in other tiles exhibited and photographed which indicated widespread water penetration of the panels. One of the experts, in her analysis, calculated that out of 455 separate planes of failure, 63 per cent were between render and mortar bed, 23 per cent between concrete and substrata and render, 6 per cent between tile and mortar and 4 per cent between brickwork and render. The balance was made up for the most part of instances of failure between concrete and bed where the render had been omitted.

Judge Smout attached great importance to the expert's evidence and quoted from his elaborate investigation which gave five primary causes of failure. The judge listed these as:

1. The entry of excessive water between the tiles and the substrata. I am satisfied that that is made out by reason of the evidence as to:
 - (a) defective weathering strips which were ineffective against driven rain
 - (b) the nature of the grout which did not waterproof the joints adjacent to the tiles and into which was driven rain and across which ran water from the face of tiles
 - (c) the existence of voids between the tiles and the bed (the photographs of the panels after removal of the tiles revealed marking on the render that very many tiles had been poorly buttered with mortar) and
 - (d) the number of dirty water marks shown in the photograph.

[The expert] suggests, as is perhaps self-evident, that the excessive water penetration resulted in internal stresses being set up by reason of frost expansion and the increased heaviness of wet render. That would lead, and as [the expert] maintains, steadily to degradation of the bond between bed and render and between render and substrata. ... [The expert] recalls that some of the battens were stained and that checks after removing the tiling invariably showed the substrata to be wet after prolonged spells of dry weather. His wider experience of the site had led me to accept his view that there was an almost continuous presence of water behind the tiling. That is not to say saturation. [This view was supported by other corroborative evidence.]

2. Differential in thermal and moisture movements between tiling (with its associated bedding) and the render and likewise between tiling (with associated bedding and render) and the substrata . . .
3. Inadequate key between render and mortar bed.
4. Inadequate key between concrete and render.
5. Excessive overall thickness of bed and render setting up sheer stresses or interfaces.

The three latter causes were corroborated in the detailed schedules as to condition and in the encyclopaedic analysis that was prepared by the experts.

Finally, completing his analysis of the expert evidence, the judge said that the facts that the experts described as causative were adequately described in their report where they stated:

We think that it is rare for a single cause to produce failure to a point where tiles become detached and believe that such failure is normally due to a combination of two or more factors.

While we have made attempts to assess and co-relate the extent of the various causes and the manner and extent of their combination on this building, these are to a large element indefinable in terms of extent of influence of any particular cause in any particular location of failure.

Judge Smout said:

In the result I have come to accept that the [experts'] diagnosis is the correct one and that there were five primary causes as listed.

This case illustrates that it is the thoroughness of surveys, the gathering of factual evidence, the analysis of the best evidence and the formation of opinions on that best evidence that provide an expert with the weight of factual evidence upon which he may base a strong opinion. Thorough preparation, coupled with convincing evidence in court and the mastery of the knowledge of the facts clearly give the expert the edge in assisting the court to the fairest evaluation of the truth in what can be a very complicated situation.

Evidence relevant to the standard of care

A typical analysis of how the Technology and Construction Court deals with expert evidence may be given by reference to one of Judge Toulmin's cases concerning the advice of consulting engineers, *Hammersmith Hospitals National Health Service Trust and Others v. Troup Bywaters & Anders (a firm)* (2000). This involved a claim by the Hammersmith Hospitals NHS Trust and the Medical Research Council ('MRC') against the defendant, a firm of consulting engineers ('TBA'). The allegations in con-

tract and tort were that as a result of the negligent advice which the claimants alleged TBA gave them, the claimant purchased two Erithglen Corsair 1000S dual fired waste incinerators which were installed at the Hammersmith Hospital in 1993 to incinerate waste. Erithglen went into receivership on 27 September 1994.

The MRC also represented the Royal Postgraduate Medical School (now the Imperial College of Science, Technology and Medicine) ('RPMS'), which occupied land and buildings within the hospital and had waste to be disposed of including both large and smaller animals that had been used for clinical research. There had been a similar case before Judge Bowsher where he had found for the health authority and awarded substantial damages against the consulting engineers (*Gloucestershire Health Authority v. MA Torpy & Partners* (1997))

The facts of this case were distinguishable from the Gloucestershire case. The Judge defined waste by reference to the Environmental Protection Act 1990 as any waste which consists wholly or partly of human or animal tissue and other waste products used in medical, nursing, pharmaceutical or similar practice. The waste frequently included substantial amounts of glass and plastic which could not be disposed of by incineration. These were in greater quantity than contemplated by the contract for sale and purchase. It was accepted by the court that TBA were not and should not be judged by the standards of specialists in combustion, incineration or waste handling technology. They should be judged by the ordinary standards of their profession, established in *Bolam v. Friern Hospital Management Committee* (1957). Insofar as they became aware, or should reasonably have become aware, that the advice of a specialist in combustion, incineration or waste handling technology was needed to advise the client, TBA were under a duty to inform the client of this in such a way that the client would be able to decide how to proceed (see *Investors in Industry Commercial Properties Ltd v. South Bedfordshire District Council* (1986)). The judge also bore in mind the extent of the duties dependent upon the terms and limits of the retainer and that any duty of care had to be related to what TBA were instructed to do. TBA argued in part that they were relieved of such duties by the claimants who took the decision into their own hands in selecting the Corsair incinerators.

Two experts were called by the parties. Mr H for the Health Authority and Mr C for TBA. TBA objected to Mr H on the grounds that his qualifications and experience were not appropriate for him to pass an adverse opinion on TBA's performance. Mr H was a specialist in combustion and incineration and had undertaken detailed design and given technical advice on large incineration plants. In their submission he was too well qualified to give an adverse opinion on the performance of 'general practitioner' mechanical and engineering building services engineers. Reference was made to *Sansom v. Metcalfe Hambleton & Co* (1998) which involved allegations of negligence against a chartered surveyor. In that case the Court of Appeal preferred the expert opinion of a chartered surveyor to that of a structural engineer in finding against the defendant and where, after reviewing the authorities, Butler-Sloss LJ said:

In my judgment it is clear that a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard.

The judge was nevertheless satisfied that Mr H was a member of TBA's profession so that his criticisms of TBA were admissible. As a matter of law it would not be right to reject his opinion on the basis that he was over-qualified.

TBA's expert Mr C eventually conceded that checks should have been made in response to a letter dated 30 January 1992 from a Mr Piggin to Mr McKenzie of TBA. That letter had given notice to TBA of problems concerning twin Corsair 1000S boilers at Derbyshire Royal Infirmary. In his evidence Mr McKenzie had accepted that with hindsight it would have been very easy to telephone Sunderland and Derby to find out whether the modifications and tests had enabled Erithglen incinerators to comply with the relevant requirements. If enquiries had been made then TBA would have been told that these had not been complied with. If enquiries had been made of Derby it would have been found that in normal running the incinerator only achieved a fraction of claimed performance. Mr H for the authority said that TBA should have made further checks.

On the other hand, it was clear that a non-specialist would have been comforted by Mr Piggin's answers. This was apparent from an earlier report on flue gas emission analysis for the installation of Corsair boilers at Ryhope Hospital in Sunderland, that further development work could be done and was being done. The effect was that some competent engineers 'would perhaps consider the assurance appropriate and others would take a more sceptical look.'

The judge concluded on this expert evidence that a reasonable body of the profession would have acted in the same way as Mr McKenzie. In all the circumstances, the judge was not satisfied that TBA fell below the level of care and skill which would be ordinarily exercised by reasonable and competent members of their profession of the same rank and standing. The judge also found that a reasonably competent engineer would not have made independent investigations rather than simply seek assurances that the plant was capable of incineration of clinical waste at the rate of throughput and in compliance with permissible emission limits. The judge did not believe that a reasonably competent engineer would in the circumstances of this case have advised against the installation of Erithglen plant at Hammersmith Hospital.

It should be noted what weight the judge attached to the expert evidence and how he applied the standard of care test. The case is an example of the utility of expert evidence clearly distinguished from the next case also decided by Judge Toulmin QC.

Opinion with hindsight

In *Pride Valley Foods Limited v. Hall & Partners* (2000) Judge Toulmin CMG QC gave another interesting analysis of expert evidence and how the courts evaluate it. The case concerned a fire in a bakery and whether or not project managers had been negligent in the advice they gave regarding fire prevention in respect of the design and materials used in the building.

The starting point in his analysis was the case of *Midland Bank Trust Co v. Hett, Stubbs and Kemp (A Firm)* (1978) where it was said:

The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks and would have done had he been placed, hypothetically and without the benefit of hindsight in the position of the Defendants is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case, is I should have thought inadmissible for that is the very question which it is the court's function to decide.

He referred also to the Court of Appeal case of *Brown v. Gould & Swayne* (1996) where it was said that evidence which amounts to no more than an expression of opinion as to what the expert would have done, does not assist the court and an expression as to what he thinks should have been done usurps the function of the judge, although in *United Bank of Kuwait v. Prudential Property Services* (1995) a more relaxed view was perhaps taken by Lord Justice Evans who said that, in certain circumstances where the expert is in reality giving evidence of good practice in a particular field, evidence may be admitted in which he says what he would have done or would have expected to be done if he had been placed in a similar situation.

Judge Toulmin went on to refer to Section 3 of the Civil Evidence Act 1972 which provides that:

1. Subject to any rules of court made in pursuance of Part 1 of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence . . .
- (3) In this section 'relevant matter' includes an issue in the proceedings in question.

and said that the effect of section 3 is to render expert evidence relevant to an issue in the proceedings subject to the overriding requirement that the evidence is in fact relevant to that issue.

Having quoted the authorities, Judge Toulmin made observations as to the

value of expert evidence relating to project management. He considered that the expert for the claimants dealt with a number of questions put by his solicitors which were really, in the judge's view, questions for the court and not for the expert. Regrettably, many of the expressions of opinion given by the claimant's expert went against the criteria as to admissibility expounded by Mr Justice Oliver in the *Midland Bank* case. The expert purported to make findings of fact which were also matters for the judge. Not only that, but the expert was an architect who gave opinions as an architect and designer which should have been judged from the standpoint of a chartered surveyor acting as a project manager. In the judge's view that offended against the ratio in Mr Justice Dyson's judgment in *Pozzolanica Lytag v. Bryan Hobson Associates* (1998). The judge explained thus:

There is an initial difficulty in accepting expert opinion evidence in relation to the duties of Project Managers. There is no chartered or professional institution of Project Managers nor a recognisable profession of Project Managers. In so far as it may be appropriate to accept expert evidence, the nature of the evidence that might be acceptable will depend on what the Project Manager has agreed to do. In some cases the Project Manager will be the Architect who will design the project and then, acting as Project Manager, supervise the contractor and the sub-contractors in carrying out the work. This is the role with which Mr Forbes Bramble is familiar. At the other end of the scale the Project Manager will supervise the work of the contractor and sub-contractors and ensure that the work is carried out in conformity with the design drawings. In these circumstances the Project Manager will have no design function even to the extent of providing an outline specification. This bears no relation to the function of the Architect acting to project manage his project.

The judge found that the defendants were employed by the claimant as chartered surveyors, not as architects. The claimant's expert gave evidence from the perspective of an architect who the judge found was used to taking responsibility for designing a project and then project managing it. The judge further found that the only relevant issue on which the expert was qualified to give relevant evidence was the third issue in that case, namely to what extent could the fire risk of the baking operations undertaken in the factory have been reduced, and at what cost by alternative means? Having reviewed the expert evidence the judge concluded that it provided little or no assistance.

At the time of writing, the case is being appealed. This may be an important case for expert witnesses in construction in so far as it gives perhaps clearer guidance as to type of expertise required and the extent to which such expertise is admissible to assist the court in arriving at its conclusions.

4.3 The importance of demeanour in court

Saigol v. Cranley Mansions Limited and Others

This case, incidentally, is an object lesson in the ills of litigation that the Woolf Reforms seek to address and may be very simply summarised in the words of Lord Justice Otton in delivering judgment in the Court of Appeal:

As a result of the gross incompetence of those responsible for the refurbishment of the block of flats and [the claimant's] flat in particular, her life has been ruined. She suffered severe and continuing damage to her health, the indignity of the bankruptcy, 11 years of litigation, a disrupted family life, a nomadic existence, loss of her home, and her professional career. This state of affairs should never have come about.

Over the eight years that the case had been running before the issues came to trial several experts had been involved and note should be taken of the remarkable and distinguished role of the architect, Mr Christopher Smart, who was called into the proceedings late in the day. As the extracts below show, Judge Thornton gave extra weight to his evidence because of his balanced views and careful answers based on detailed investigations (albeit not all his own).

I found Mr Smart a careful and helpful expert on questions of breach of duty. He gave considered answers and carefully explained the limitations he was working under. These were, principally, that he had come into the case nearly 6 years after the dispute had crystallised, had not been able to inspect the Block or the Flat when these were exhibiting the defects of which complaint was made and was taking over another expert's detailed considerations. Happily, Mr Waller, his predecessor, had evidently approached the case with the same degree of care and detachment and Mr Smart was able to adopt and support his conclusions without reservation, save for the modest redrafting of some of them. Mr Smart was still able to obtain first-hand evidence as to the state of the brickwork and pointing, since Cranley had had neither the inclination nor the resources to repair these in the intervening period. I was able, therefore, to place confident reliance on his evidence and my findings in this section are largely the result of that reliance.

The judge considered a point where opposing counsel maintained that Mr Smart had failed to answer questions properly in cross-examination and continued:

I dwell on this example because it is a good example of the care Mr Smart took with his evidence. Had he been dogmatic and had his answers been unqualified, he would rightly have been accused of not giving reliable opinion evidence in a case into which he had been parachuted six years

after the dispute had crystallised. Instead, he gave some thought and care to each answer, readily acknowledging his difficulties when appropriate. I am bound to say that the approach of Congreve's submissions is of the 'damn him if he does; damn him if he doesn't' variety. Had his evidence been unhesitant and unequivocal throughout, he would have been accused of being unfair and hasty in his opinions; had he been hesitant and qualified in his answers, he would have been accused of being unreliable. I have carefully reread the whole of his evidence and that rereading confirmed my impression at the trial, which was that he succeeded in treading that fine line between dogmatism and equivocation. Hence, I found his evidence reliable.

In contrast the judge said of another professional who had been involved in the case from the beginning that his manner was 'overbearing, offensive and extremely unhelpful' and found his evidence 'dogmatic and unyielding'. Judge Thornton acknowledged that this expert lacked experience, was acting in difficult circumstances and had not been fully briefed, but he nevertheless concluded that 'his opinion evidence was not reliable'. Since the judge felt he had to comment on it, his manner in court was undoubtedly a factor in this.

The handicap of an appellate court

The case of *Joyce v. Yeomans* (1981) illustrates the point that, in the case of evidence given by experts, the trial judge who had the opportunity to observe their demeanour is in a slightly better position than the appeal court to assess the value of evidence given. Accordingly the appeal court should be slow to interfere with judges' findings on matters of opinion evidence and even less inclined to interfere with evidence of witnesses of fact.

This slightly differs from the leading case of *Whitehouse v. Jordan* (1980) where their lordships were content to interfere with the judge's findings at first instance.

In the *Joyce* case, Lord Justice Waller referred to the observations of Lord Thankerton in the well-known case of *Watt (or Thomas) v. Thomas* (1947) where he said:

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion...

The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Interestingly Lord Justice Brandon in *Joyce* had some words to say as to the role of the expert witness where apparent weakness may actually be strength. He said:

Sometimes an expert witness may refuse to make what a more wise witness would make, namely, proper concessions to the viewpoint of the other side. Here again, this may or may not be apparent to the appellate court but plain to the trial judge.

Interesting features of this case illustrate that if the expert evidence is so convincing, then it will carry great weight, and if of sufficient weight and successful at the first instance, an appellate court may be most reluctant to interfere with it.

Secondly, Lord Justice Brandon hints that it is sensible for experts sometimes to concede in proper circumstances. Often one finds experts take up intractable positions from which it is impossible for them to withdraw. This is the problem that Lord Woolf was presumably considering when he made the point in his Final Report p. 137 that, 'experts sometimes take on the role of partisan advocate instead of neutral fact finders or opinion givers'.

4.4 Whether the court has to accept the expert's opinion

In *Davie v. Edinburgh Magistrates* (1953), a most important case involving the evaluation of expert opinion evidence, it was held that formal corroboration was not required in the same way as for proof of an essential fact so far as expert opinion evidence was concerned, but the court was not bound to accept the conclusions of an expert witness simply because it was uncontradicted. The court also held that a court was not entitled to rely on passages in scientific literature except insofar as that literature and opinions expressed therein had been adopted by a witness and made part of that witness's evidence or had been put to him in cross-examination.

Summary

The facts of the case were as follows. During the construction of a sewer a number of dwelling houses were damaged and their owners attributed the damage to blasting operations associated with the construction. In the case (a Scottish action) the pursuer (claimant) adduced no scientific opinion evidence regarding the effects of explosions on adjacent buildings, whereas the defenders (defendants) adduced the evidence of three expert witnesses in that regard. One of the experts who had made researches into the effects of blasting on nearby buildings gave evidence to the effect that the explosives used could not possibly in the circumstances have caused the damage complained of. The second expert was taken as concurring with the first expert in his evidence-in-chief and in cross-examination, but he was only

cross-examined in regard to his qualification to give such evidence. The third expert gave evidence different from and materially contradictory to the first expert. In cross-examination the first expert referred to certain pages of a scientific pamphlet in support of his views and in re-examination he was referred to that pamphlet.

At first instance the court, having rejected the expert opinion evidence and awarded damages, gave its judgment on passages in the pamphlet which had not been referred to by, or put to the witness. The defenders appealed on the basis that

- (1) the pursuer had not led any expert evidence to counter the evidence of their first expert and the court was bound to accept that expert evidence;
- (2) the conflicting evidence of their third expert should be ignored; and
- (3) the court was not entitled to have regard to part of the scientific pamphlet which had not been referred to in evidence.

It was contended for the pursuer that the evidence of the first expert was uncorroborated, as the second expert who had concurred with him was not qualified to express a reliable opinion.

Detailed analysis

At first instance the defenders adduced among other witnesses a civil engineer. He gave evidence to the effect on houses of underground blasting and in particular, stated that the shock of explosion lessened according to the square of the distance from the point of explosion, and that the blasting complained of would not have caused the damage complained of owing to its distance from the house.

The defenders also led the evidence of a mining engineer and an adviser on blasting who had made a special study of the effect of blasting vibrations on structures. His evidence was to the effect that the amplitude of ground movement was proportional to the square root of the charge employed and inversely proportional to the distance of the charge from the building concerned, that the power of the explosive was relatively immaterial, and that it was its weight which was material. He further gave evidence that the amplitude of the movement permissible with safety in the case of blasting in the vicinity of houses was much greater than that which could be caused by the weight of explosives used by the defenders' contractors and that a far greater weight of explosives could have been exploded at one time without damaging the pursuer's house. In cross-examination the mining engineer was asked for the names of the standard text books on the subject on which he had given evidence and he mentioned, *inter alia*, a pamphlet *Vibrations Due to Blasting and Their Effects on Building Structures*. Later, in re-examination, passages on pages 12 and 13 of this pamphlet were put to the witness and accepted by him as consonant with his evidence. The next witness for

the defenders was Mr Sheddan who was taken as concurring in examination-in-chief and in cross-examination with the mining engineer.

When the action was appealed to the Court of Session the Lord President, Lord Cooper, had to decide whether it had been sufficiently proved at first instance that the damage to the pursuer's house was attributable to the blasting conducted by the defenders' contractors between November 1948 and December 1949. In the course of giving his judgment he said:

That the single issue is thus one of causation; and this is an issue of pure fact for determination by the court, aided by expert opinion evidence on the technical and scientific aspects of the case . . .

On the major issue of liability the evidence falls into three chapters:

- (1) factual evidence;
- (2) expert evidence of an architectural or engineering nature relating to the structural damage and its probable cause; and
- (3) scientific opinion evidence on the theory of propagation of ground waves caused by explosives.

Chapters (1) and (2) occupy much the greater part of the proof and include the evidence of some 19 witnesses . . . If there were nothing more in the case than this, it would be quite impossible for us to overturn the judgment of the Lord Ordinary who accepted this evidence for the inference as to causation is well nigh irresistible. I understood the defenders to accept this, and it is therefore needless to examine the details of the evidence, much of which was graphic and impressive.

The only difficulty experienced by the Lord Ordinary and developed before us arose from the scientific evidence regarding explosives and their effect. This evidence was given by Mr Teichman (civil engineer) one of the technical staff of ICI with whom a fellow employee Mr Sheddan was taken as concurring. Mr Sheddan was cross-examined on his qualifications with considerable effect, and the point was taken that Mr Teichman was duly uncorroborated. I do not consider that in the case of expert opinion evidence formal corroboration is required in the same way as it is required for proof of an essential fact, however desirable it may be in some cases to be able to rely upon two or more experts rather than upon one. The value of such evidence depends upon the authority, experience and qualifications of the expert and above all upon the extent to which his evidence carries conviction, and not upon the possibility of producing a second person to echo the sentiments of the first, usually by a formal concurrence. In this instance it would have made no difference to me if Mr Sheddan had not been adduced. The true question is whether the Lord Ordinary was entitled to discard Mr Teichman's testimony and to base his judgment upon the other evidence in the case. A founding upon the fact that no counter evidence on the science of explosives and their effects was adduced for the pursuer, the defenders went so far as to maintain that we were bound to accept the conclusions of Mr Teichman. This view I must firmly reject as contrary to the principles in accordance with which expert

opinion evidence is admitted. Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court – *S.S. Bogota v. S.S. Alconda* (1923) ... Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge or jury. In particular the bare *ipse dixit* of a scientist, however eminent upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert'.

The judge went on to say:

Passages from a published work may be adopted by a witness and made part of his evidence or they may be put to the witness in cross-examination for his comment. But, except in so far as this is done, the court cannot in my view rely upon such works for the purpose of displacing or criticising the witness's testimony.

He concluded by saying:

Independently of this pamphlet there is in my view amply enough in the case before us to justify fully the rejection of the explosives evidence as insufficiently vouched, unconvincing, and insufficient to displace the inference arising from the remaining evidence in the case.

This case has been inserted as a matter of interest for Scottish experts. It also reflects the concern of judges both in England and Scotland as to the presentation and substance of the expert evidence. Corroboration is no longer required in civil proceedings in Scotland by virtue of section 1 of the Civil Evidence (Scotland) Act 1988. It remains however a good illustration of an evaluation of expert evidence and the difficulties presented.

It is also now possible to suggest that the inherent conflict between the opinion of the expert witness and the trial judge has been put in its appropriate context in the Civil Procedure Rules whereby the expert's overriding duty is acknowledged to be that of helping the court (rule 35.3); the expert does not make the decision of the court.

4.5 Summary

- (1) In civil cases the burden of proof is upon the claimant to prove its case on the balance of probability, i.e. the most likely explanation of the facts of the case as proved. Here the expert can provide useful assistance to the court in explaining the technical details and matters of causative effect.
- (2) There is no substitute for thoroughness and dedication to the task.
- (3) The expert must be convincing, he must be careful of every word he writes or says, and must be prepared to stand by it.
- (4) The expert's evidence must be his evidence subject to the Civil Procedure Rules.
- (5) The value of the expert's evidence depends upon his authority, experience and qualifications and upon its conviction – is he to be believed?

Chapter 5

Formulation of the Issues

Lawyers speak of 'issues of fact' and 'issues of law'. The expert witness is concerned with 'issues of fact' upon which he bases his opinion. The word 'issue' has been legally defined in *Kaiso Finance Establishment Anslatt v. John Wedge* (1994) as 'a dispute of fact or law relied on by way of claim or defence'. Although issues involve disputes about facts it has been held that a mere dispute about facts divorced from their legal consequences is not an issue (*Fidelitas Shipping Co Ltd v. V/O Exportchleb* (1966)).

5.1 *The initial stages*

As soon as a dispute arises in a construction case the parties, be they employer, contractor or architect, will call upon their advisers, in-house or independent, for advice as how best to resolve the dispute. If it is a defects case the parties will want to establish who is responsible technically and liable legally.

Before instructing any expert, the client will usually want to consider the advice of the professional team of consultants on the project, but for various reasons such advice may not be appropriate. For example, where damage has been caused but professional responsibility is unclear, the client's better course is to instruct an independent expert, i.e. one outside of the professional team, to investigate and give the client his opinion.

The expert will investigate the nature of the problem and give the client a written report which will describe the problem and suggest remedial measures.

The expert will, therefore, be asked at an early stage to diagnose the problem and its cause, sometimes to express a view, and decide who is responsible. This he usually does by way of a preliminary report. Such preliminary advice may be privileged if given in contemplation of proceedings but it may also be subject to disclosure under the new rules and the court's discretion as to the admissibility of such.

On the other hand, the report may be disclosed to the opposing side in the hope that they will accept the expert's findings and resolve the dispute accordingly.

The Pre-Action Protocol

The new culture of civil litigation in England and Wales is directed towards openness fairness and the economic expedition of proceedings. This neces-

sarily requires claimants and their opponents to be candid with each other and encourages a frank exchange of views between experts. Thus if a party has obtained a preliminary report for the purpose of achieving an early exchange of views and promoting a possible settlement the client's lawyers may consider submitting it to the other side and having bipartisan meetings on a 'without prejudice' basis between experts.

The Pre-Action Protocol for the Construction and Engineering Disputes issued in August 2000 goes a long way to formalising these procedures. The general aim of the Protocol is set out in Paragraph 2 thereof:

The general aim of this Protocol is to ensure that before court proceedings commence:

- (i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
- (ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
- (iii) there is more pre-action contact between the parties;
- (iv) better and earlier exchange of information occurs;
- (v) there is better pre-action investigation by the parties;
- (vi) the parties have met formally on at least one occasion with a view to
 - defining and agreeing the issues between them; and
 - exploring possible ways by which the claim may be resolved;
- (vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and
- (viii) proceedings will be conducted efficiently if litigation does become necessary.

The names of any experts already instructed have to be set out in the initial letter of claim (Paragraph 3(vii)) and, although Paragraph 5.3 does not specify such experts as persons whom the court would expect to attend Pre-action Meetings, it is quite likely that they will be involved. Being experienced on the technical side and not personally or directly involved in the dispute an expert is more likely to be able to work well with his opposite number in defining and narrowing the issues to be placed before the court, than the client.

Gathering materials

The issues may be formulated only in a general way at this early stage and will gradually evolve as investigations progress and the evidence accumulates.

The expert must obtain whatever evidence is available to give his preliminary opinion and must visit the site to obtain direct evidence.

The expert's aim must be to collate as much best evidence as possible. In a construction case the basic documentation he will have readily available is that in his client's possession. Depending on whether that client is the employer, architect, engineer, contractor or subcontractor, the basic documentation will be:

- original contract documentation including tender, bills of quantities or specification, drawings and correspondence;
- architect's instructions, certificates, variation orders, site instructions, valuations;
- site diaries, daywork records, weekly reports, monthly returns, clerk of works' reports;
- site meeting minutes, accounts, final accounts.

Nowadays computer records contain vital information that must be reviewed for the purposes of relevance to issues and may be required to be produced in court. The identification and whereabouts of such evidence may be the subject of requests for information and disclosure orders at a later stage.

Where acting for a local authority the expert may have to obtain:

- relevant committee reports and decisions;
- minutes of officers' meetings;
- relevant internal memoranda between departments involved;
- names of instructing officers and their location.

Whether he has to gather these or not depends upon their strict relevance and use. Other considerations may also obtain and the expert must seek instruction from the solicitor responsible for the case.

Subsequently, the expert may require further documentation that comes into existence as a result of remedial work. It may be a major repair contract in which all the above categories of documents will be applicable.

The expert will also frequently obtain evidence from:

- manufacturers of certain materials/products used in the construction;
- surveys of the building (survey sheets and reports);
- sample testing of materials (test results);
- photographs.

At the same time as he collates this evidence, the expert should be considering matters of design and construction, assessing all relevant codes of practice, articles and professional journals, government and professional reports, checking Building Regulations and local authority requirements, BRE Digests and any other relevant information; for example, manufacturers' guidelines may be of indirect interest or assistance.

The expert should be aware that an initial report by way of a preliminary view may in certain circumstances become disclosable to the other side. It is therefore important that he should use great care in drafting even a very early report and qualify it with the appropriate caveats.

5.2 *Statement of case*

The expert will be assisted in the formulation of the issues by the lawyers who may facilitate research his research directing him to certain relevant matters they perceive to be in issue in any likely dispute. If the solicitor believes there is a case for the other party to answer, he will take instructions from his client and follow the appropriate practice outlined in the Protocol. This requires him to prepare the case proportionate to the importance of the issues and to give notice by letter to the intended defendant. That letter of claim should be ideally prepared where necessary with the benefit of the expert opinion. Having followed the Protocol and been unable to resolve by negotiation or mediation, the solicitor may then ask counsel to settle the claim and Particulars of Claim which may be endorsed on the claim form or served separately. The claim form must contain a concise statement of the nature of the claim encompassing all the issues in dispute between the parties. This description follows the general endorsement on the old form of writ of summons. The claim form must include names of witnesses and expert reports that may be considered necessary to the claim (Rule 16.4 CPR and Practice Direction 16. 11.3).

If there is an arbitration or alternative dispute procedure agreed by the parties then the solicitor will give notice of arbitration with counsel drafting the Points of Claim as may be necessary.

The Statement of Case and Points of Claim must contain precise details of the claim, the causes of the problem in dispute, the location of the defects, dates when the problems arose, the names of the parties responsible and the instances where it is alleged they were in breach of their respective legal obligations and duties.

The Particulars of Claim must refer to the facts in dispute. Documents referred to in the Particulars may be attached to them to assist the parties and the court in readily understanding the issues. For example, where the contractor is alleged to be at fault, it may plead that the contractor contracted to carry out the works shown in the drawings and described in the contract bills or specification. It may then state the facts upon which the claimant relies to prove certain allegations against the contractor and/or architect e.g. contractor failed to carry out or complete the works. The pleading may then allege that the contractor was under an implied duty at law to carry out the works in a good and workmanlike manner and that the contractor should have used materials which were of good quality and fit for their purpose. The expert will be concerned particularly with the descriptive elements of the pleading e.g. particulars of the defect which may closely follow the description of the expert's report as these are factual/technical matters. The Particulars must be factual and concise. (Under the Civil Procedure Rules 1998 a claimant may refer in his Particulars of Claim to any point of law on which his claim is based but this aspect of drafting is for counsel.)

There is set out below an example of giving particulars of defects:

External works

- That the defendant contractors used mortar mix that was not of sufficient consistency and did not comply with the requirements of BS...
- That mortar joints to brickwork were excessively recessed resulting in the wet outer skins reducing the overall insulated value of the external walls.
- That insufficient mortar was used at perpendes producing dry joints at the said perpendes.
- That the brickwork in general has no adequate movement joints.
- Aware that there are movement joints but that these have been incorrectly filled with material which is insufficiently compressible for use in brickwork. This means that the joint is unable to operate properly.

Services

- That ceilings to gas-heater cupboards were omitted and the flues for the said heater units built off the first floor joists were in contravention of the local building byelaws and Building Regulations.

Where there are allegations against construction professionals particular care is needed. In those cases the expert may be called upon to give his professional opinion of the standards of the work.

Numerous examples of liability for breach of duty are contained in *Jackson and Powell on Negligence*. The authors consider

- breach of duty of the architect, quantity surveyor, engineer as breach of an implied contractual duty to exercise reasonable care and skill;
- the breach of a duty of care owed to the client independently of the professional's contractual duties; and
- a breach of a duty of care owed to third parties.

They give some examples of breach of duty including:

- inadequate examination of site;
- errors in design;
- provision of misleading estimates;
- errors in preparation of bills of quantity;
- failure to take reasonable steps in the selection of contractors;
- failure to administer the contract properly; and
- inadequate supervision.

This is not an exhaustive list and there are numerous statutory duties that can be considered (see Chapter 2)

5.3 Site investigations

Formulating the issues can only come after careful site investigation and analysis of the causes of the defects and other problems on site. The expert

must also analyse all the documentary evidence available from his clients. The Building Research Establishment *Digest* defines site investigation as 'the study of site conditions to determine their probable influence on the design, construction and subsequent performance of a building'.

Where the expert is acting for the contractor, it is preferable if the preliminary site investigations are carried out by the contractor working directly under the supervision of the expert witness. The expert can then direct the contractor as to what needs to be preserved for the purposes of evidence and what samples need to be taken for testing.

For any site investigation there need to be clearly defined objectives. What is the investigation about? This will largely depend upon what complaints have been received about the building and what damage has been caused. This will give the expert an indication of what has to be investigated and examined, for example on a major council housing estate where tenants regularly complain of dampness in walls and leaking roofs, this will alert the expert to investigate which properties have been affected and in what way. If the complaint is damp walls the expert may question the cause, is this rising or penetrating damp? Is the damp-proof course in good order? Was it put in correctly? Has it been bridged or punctured in some way? If there is penetrating damp, is it because the wall is exposed to above average weathering? Is it adequately protected?

All these are matters which can start the investigation. Generally, local authorities will have abundant evidence of defects in their housing departments' tenants' files, in their maintenance department records or with their own architects' or engineers' departments. These are ready sources of valuable information if one is briefed on the authority's behalf.

After establishing the objectives and studying available documentary evidence, the expert should have an initial site inspection. This may give him an idea of what is in store in future, what the costs of the investigation are likely to be, what type of contractor is required and how much opening up has to be done. The expert will be able to advise his employer on tenders for the work, the job specification and the scope of remedial works. This will usually be contained in a preliminary report or possibly a special remedial works report with approximate figures and costs for a whole scheme, or for a pilot study of various properties.

During the course of these investigations the expert may call in a specialist to examine a particular problem, for example a water services engineer to investigate any water flow problems in a council housing estate central heating system. It may be necessary to test the system in various ways, and for this specialist skills are required.

Following the site investigations, the expert may submit his initial findings by way of a preliminary report to his client and his solicitors, who will then advise on any necessary legal steps to be undertaken to secure redress or relief.

5.4 Summary

No dispute should be the subject of any action in court unless and until the construction problems and issues in dispute have been properly identified as disputes and investigated. Whether or not experts should be involved is a matter for careful consideration as to time and cost and the potential for giving expert evidence when qualifications and experience will be a key factor.

If the issues are technically complex and need expert investigation then appropriate experts may be retained to investigate the matters in issue. Particular care needs to be taken in their instructions with regard to:

- scope of the investigation;
- the compiling of particulars of claim based on the expert evidence and expert's findings;
- documentary evidence relevant to the issues;
- compliance with the court Protocols;
- any allegations of professional negligence.

Chapter 6

Procedures for Resolution of Disputes

There are various methods of dispute resolution in the construction industry:

- adjudication (now mandatory under statute);
- arbitration and litigation (the traditional means recently transformed by the Arbitration Act 1996 and the Civil Procedure Act 1997);
- mediation, expert determination and other ADR methods.

An outline of the development and procedural aspects of these methods given later in this chapter may assist the expert witness in assessing his role in context. However, this guide is principally directed to his role in litigation and even litigation in England and Wales is going through a period of fundamental change from the traditional 'adversarial' system to a more hybrid mode that adopts some features of the contrasting 'inquisitorial' system, i.e. case management by the courts and more intervention on the part of judges.

6.1 Changes to the English adversarial system

The expert will usually only experience the adversarial system. He may, however, venture abroad as his experience grows and he achieves status and recognition for his particular expertise. He will also experience the development of inquisitorial techniques in arbitration, litigation and statutory adjudication. Therefore a general knowledge of the chief characteristics of these methods of dispute resolution will help the expert to understand his role. It is right to emphasise that his role at all times is facilitative in this process.

Although we still have an adversarial system, the balance of control within that system has been changed to a case management system controlled by the courts and in arbitration the parties have an opportunity of creating their own procedure provided it complies with the rules of natural justice.

The characteristic elements of litigation after the Woolf reforms are:

Adversarial

- each party presents its own case;
- each party calls its own witnesses;

- witnesses subjected to oral examination unless documents only;
- the court bases its judgment on the evidence presented by the parties;

Managerial

- The court controls the procedure by its case management powers.
- Judges are now under a duty to ensure that the concept of proportionality is observed so that state resources are not wasted. As a public service they must have regard to other cases in their list and so may encourage ADR through case management directions.
- The court may encourage the use of single joint experts and limit numbers of experts where necessary.
- In the exercise of case management powers, the courts may be seen to become more interventionist.

The basic elements of cultural change in civil procedural may be discerned from:

- the concept of court control;
- the new collaborative regime amongst lawyers to co-operate rather than antagonise their opponents;
- the trend towards the interventionist judge/manager;
- the single joint expert concept;
- the doctrine of proportionality.

Concept of court control

The basis of court control is the degree to which the court is permitted to spend its time on particular cases having regard to public demand, i.e. the state of 'the lists', and the cost in terms of court service facilities and salaries. In a world of 'best value' practice or 'value for money' civil justice is now regarded from the viewpoint of economy. Thus the courts must, as a matter of economics, apportion their resources in appropriate shares to litigants in accordance with the overriding objective, stated as rule 1.1 of the Civil Procedure Rules:

- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable—
 - (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;

- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Experts may find that judges are therefore no longer passive in the English tradition but alert modern case managers, anxious to focus on the issues and not waste time or costs. The court's duty to manage cases is set out in rule 1.4 of the CPR:

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes—
 - (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
 - (b) identifying the issues at an early stage;
 - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
 - (d) deciding the order in which issues are to be resolved;
 - (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
 - (f) helping the parties to settle the whole or part of the case;
 - (g) fixing timetables or otherwise controlling the progress of the case;
 - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (i) dealing with as many aspects of the case as it can on the same occasion;
 - (j) dealing with the case without the parties needing to attend at court;
 - (k) making use of technology; and
 - (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

What the above demonstrates is a shift in the adversarial balance away from the traditional system controlled by the parties to a court case-flow managed system, influenced perhaps more by economic considerations (for the public purse as well as litigants) than procedural or legal reform.

New cultural régime

The implementation of case-flow management procedures in England and Wales has been built on the experience of the Commercial Court and the Official Referees' Court (as it then was), to encourage a greater 'openness' between the parties or a 'cards on the table' régime. Pre-action protocols are intended to encourage the parties to exchange information and to investigate

the facts before there is any resort to litigation. The Pre-action Protocol for the Construction and Engineering Disputes (see Appendix IV) is aimed at identifying and narrowing issues between the parties and seeking some amicable resolution before litigation is undertaken. Even if this is not achieved, it will still ensure that the parties are much more aware of what their differences are, what process is entailed and the likely financial consequences. The expert has a clear role to play in this in advising on the technical and scientific merits of the argument for drafting the letters of claim and response so as to facilitate perhaps the earliest and most economic resolution of the dispute.

The new cultural regime requires that all concerned in the resolution of disputes take a more positive approach towards constructive negotiation without resort to positional bargaining. In cases of clear and wide differences of opinion and principle, it may be very difficult to compromise the client's claim of right in law, but in most cases where the differences are not so clear and there is doubt on both sides for lack of evidence or lack of clear legal authority for certain elements of the claim, then settlement may be more likely. In the latter situation, the precepts of 'principled negotiation' pioneered by Harvard Law School, may be of considerable assistance. This was developed at the Harvard Negotiation Project and is geared to deciding issues on their merits rather than through a haggling process focused on what each side says it will and will not do.

The concept of 'proportionality' inevitably requires the expert to give an honest assessment of the technical and scientific merits as well as quantifying costs and damage. At the same time it will facilitate an assessment of the amount of further investigatory work to be undertaken so that lawyers can determine whether it is 'proportionate' to continue or settle.

The interventionist judge

Some years ago Judge Peter Bowsher wrote a constructive and thought provoking paper on the role of interventionism in the construction court. In many respects it reflected the practice of the Official Referees whose practical experience of highly complex cases was ahead of its time. It has remained so. So far as experts were concerned there was obvious judicial concern at delay, failure to agree technical matters and difficulty as to reconciling totally irreconcilable expert opinion.

The unique position of the English TCC judge is that he is experienced in construction and engineering disputes but remains both trained in the law and totally independent of the parties. He also has the authority of the state behind him to enforce his decisions. The judge's utility in this respect may be directed to ensuring that expert evidence is regulated insofar as:

- the experts answer the same questions and issues in their report;
- the experts do not answer questions that are the prerogative of the judge;
- the experts exchange reports and meet in order to agree facts and figures;

- the experts explain why they cannot reach agreement;
- the experts' costs are proportionate to the merits of the case;
- expert evidence is not adduced unnecessarily.

The new rules facilitate these points. In particular by rule 35.12 the court can direct that there be discussion between experts to identify issues and reach agreement. The court may go further and identify the precise questions to discuss. The experts should prepare a statement of facts upon what they have agreed and what they disagree. If they disagree they must give reasons.

Importantly for the expert, if there is an impasse and the expert has difficulty, he can apply to the judge directly for directions under rule 35.14. (See Appendix V for the full text of Part 35.)

The single joint expert

As a general power the civil court may direct that the evidence on a certain issue is given by one expert only (rule 35.7). The 'instructing parties' can agree on such an expert, otherwise the court may select an expert from a list prepared by the parties or direct that the expert be selected in another manner. The objective of such an exercise of interventionist power is to save time and cost. The court has to consider whether the calling of different experts to give evidence is proportionate to the particular case when any one expert in a particular field can give information on a range of current opinion (although he may personally prefer one above the others) and, if specifically retained to advise the court, is obliged to do so. The court's intrusive role may be interventionist but it is also practical. Current trends are possibly moving towards a more equitable system in terms of accessibility but more pragmatic solutions in terms of public justice.

In the last edition of this book reference was made to court experts appointed under the Rules of the Supreme Court, Order 40. There were very few appointments of such experts in the history of the Official Referee's Court but the new rules have been carefully drafted in order to overcome past procedural difficulties.

Either the parties put forward lists of experts or the court may request the appropriate professional body to appoint an expert. The judge does not appoint the expert except from a list approved by the parties. Party autonomy to a degree is preserved because each party may give instructions to the expert. A report may be accepted in written form without the need to call the person to give evidence. If the single joint expert is called by the instructing parties, either party's counsel may cross-examine that expert.

The court can take its own initiative in proposing a direction for such appointment on a particular issue. It may give any person likely to be affected an opportunity of making representations.

The difficulty of an issue covering various disciplines may be overcome by the court appointing a leading single joint expert from the dominant discipline whose report incorporates the contents of any report from experts in

other disciplines. (Paragraph 5 of Practice Direction 35 (Experts and Assessors).)

The court may give directions about the payment of experts' fees and expenses and any inspection, examination or experiments which the expert wishes to carry out. The court can also limit the amount that can be paid by way of fees and expenses to the experts and direct that the instructing parties pay that amount into court (Rule 35.8).

The doctrine of proportionality

Perhaps the most important procedural principle underpinning the Civil Procedure Rules is the idea of proportionality. The role of the expert witness is subject to this principle because of erstwhile tendencies for abuse the proliferation of expert evidence being identified by Lord Woolf, together with excessive documentation, as one of the major factors contributing to the prohibitive costs of litigation. Dealing with cases proportionately means that the courts will have regard to:

- the amount of money involved;
- the importance of the case;
- the complexity of the issues; and
- the financial position of each party.

Proportionality is designed to cure the evils of unnecessary delay and cost.

For the expert it means that the time spent and the cost of his efforts must be balanced against the benefit of the case in terms of its merit, importance, complexity and value. The expert is now accountable to the court, not just the parties. Experts are also subject to an activist judiciary who will not be sympathetic to unnecessarily protracted expert debates. A more precise and practical approach to the issues of the case is demanded and required. In this context there is reason for lawyers and experts to correct the balance between accuracy of justice and affordability.

The principle of proportionality is also served by the allocation of cases to the appropriate 'track'. Rather than the old distinctions between the small claims procedure before County Court Registrars (as the District Judges used to be known), the County Court (with a set financial limit) and the High Court, matters are now allocated to the Small Claims Track, the Fast Track or the Multi-track. Some cases may be allotted to Small Claims Track, more straightforward cases (but with a financial value too high for the Small Claims Track) are allocated to Fast Track, others to the Multi-track.

Cases before the Technology and Construction Court will usually be Multi-track by virtue of their complexity and the amount of money involved in such disputes. However the expert may be engaged on behalf of one party or as a single joint expert in a Fast Track case or even, with the permission of the Court, a Small Claims Track case and he should be aware that different procedures, and costs limitations, apply to each track.

Since April 1999 the High Court and County Court have a common procedural code, the Civil Procedure Rules. In effect the procedural distinctions between these courts have disappeared so that the only jurisdictional difference is in terms of value and specialist proceedings. It has been suggested that the names High Court and County Court could possibly disappear in the future so that there is only one Civil Court with general and specialist jurisdictions. Although such a development is very hard to visualise at present.

The jurisdiction of the County Court in construction matters at the time of writing is reserved to:

- cases where the value is less than £50,000.00 where there are no complex issues of law;
- Fast Track and Small Claims.

In Fast Track cases parties may find it difficult to get leave to admit any expert evidence. In low value Multi-track cases in the County Court the parties may also find resistance because the County Court judges are very keen on keeping overall costs in proportion to the value of the claim. The employment of single joint experts may become more common once the clients, the legal profession and experts become familiar with their new role. What the courts may not want is the employment of retired practitioners who do nothing but expert witness work and are not actually in practice. Such an expert is not really qualified as an expert witness because he lacks 'hands on' practical experience. Judges want someone with up-to-date experience in the type of technical issues that arise in any particular case and to give guidance on how his profession recognises and adapts that current practice.

6.2 Statutory adjudication under the 1996 Act

Since cashflow is the life-blood of the construction industry and architects/engineers have lost their former position as controllers of cost it was felt that contractors, in particular sub-contractors, required a quick and cheaper remedy as an alternative to arbitration to resolve payment disputes without unnecessary procedural delay or complexity.

The statutory provisions

Part II of the Housing Grants, Construction and Regeneration Act 1996 introduced radical measures to deal with the issue by making it compulsory for contracts entered into after 1 May 1998 to contain provisions for the swift, but interim, settlement of disputes by adjudication. Section 108 of the Act provides:

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose 'dispute' includes any difference.

(2) The contract shall—

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

It follows that unless both parties agree any dispute will be settled within two months of notice of intention to refer being given. To be fair such swift justice has to be interim only and section 108 continues:

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

However, until otherwise ordered by the court or by arbitration, any decision of an adjudicator has to be paid and is enforceable by summary proceedings. This prevents the situation where relatively innocent claimants were kept out of their money for months if not years by defendants raising spurious issues in defence, a tactic employed regrettably often under the previous régime.

It is not possible to contract out of these provisions since, if the contract does not comply with the Act the provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI No 640 of 1998), detailed rules for adjudication, automatically apply.

The Act gives a statutory definition of 'construction contract' which includes the carrying out of construction operations, subcontracting and the provision of labour. Within this wide definition is included various kinds of construction including repair, maintenance, demolition, roadworks, power lines, installation and fit-out works, harbours, pipelines, water mains, drainage, coastal protection, site clearance and decorating. However

statutory adjudication does not apply to a place of residence where the residential occupier is a party to the construction contract as there is not the same inequality between employer and contractor if the employer is a private person.

The authors and publishers of the standard forms of construction contract were not slow to introduce the necessary terms into the standard forms of contract, for example, Clause 41A in JCT 1998 WCD. The JCT terms generally mirror the statute insofar as they recognise a party's right to give notice of intention to refer to adjudication at any time, the reference to the adjudicator within seven days, and the requirement that the adjudicator reach his decision within 28 days of the referral although he can be allowed a further 14 days.

The involvement of experts

Expert witnesses will note the provision in Clause 41 A.5.7 of JCT 1998 WCD enabling the adjudicator to obtain such information and advice on technical and legal matters, recognising the role of both the lawyer and the expert witness. Under the Scheme for Construction Contracts (England and Wales) Regulations 1998, paragraph 13(f) of the Scheme likewise provides that an adjudicator, may, upon giving notice to the parties of his intention to do so, appoint experts, assessors or legal advisers. No particular guidelines or rules exist for the appointment of the expert, but it is suggested that any such appointment should deal with:

- the expert's brief, e.g. to visit the site and report on the state of alleged defective work and his opinion thereon;
- his fees and expenses for which the adjudicator must be solely liable;
- the time scale within which he must report to the adjudicator;
- whether such report will be disclosed and is disclosable in the proceedings or any subsequent proceedings;
- whether (unusually) the expert may be called upon to give oral evidence at any adjudication hearing.

Whether the expert witness is retained by the referrer or by the adjudicator he will readily appreciate the tight time scales in the adjudication process, the primary objective being that the adjudicator must reach his decision within 28 days, subject to an extension if the parties agree. Possibly the busy expert will find that it is difficult to be involved with several adjudications at once or mix expert witness work, in court with adjudication where the time scales are so very demanding.

The expert as adjudicator

Expert witnesses are primarily concerned with acting in that capacity for one or other of the parties in adjudication matters or else are consulted by the

adjudicator under the procedures referred to above. Some experienced expert witnesses may, however, qualify as adjudicators after the relevant training. Such training is an obvious career development for the experienced expert and a heavy workload was anticipated with the coming into force of the 1996 Act in May 1998, hence Ian Duncan Wallace's remark on there being more would-be adjudicators than active architects and engineers quoted at the end of Chapter 1.

Under Clause 41 A.5.4 JCT 1998 WCD the adjudicator does not have to give reasons for his decision although by paragraph 22 of the statutory scheme he does have to give reasons if requested by one of the parties. Except in the case of bad faith the adjudicator is fully protected in his duties. Paragraph 26 of the Scheme provides:

The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.

An expert acting in such a capacity would accordingly enjoy similar immunity from suit as is applicable to an arbitrator (see below). Even if the final result of arbitration or litigation on the issues is different to the adjudicator's decision this is simply in the nature of the system. The party which may have suffered inconvenience or financial loss in complying with an interim decision which is overturned cannot thereby claim compensation from the adjudicator who made it.

The roles of expert determiner and adjudicator distinguished

In the course of his career the expert will come across various forms of dispute resolution of which only a mere outline appears in this text. It is important for an expert witness to understand the distinctions between the functions of an expert determiner and an adjudicator acting under the Housing Grants, Construction and Regeneration Act 1996.

The expert determiner acts on the basis of a reference of a question for determination and answer. He, like an adjudicator, must give a decision on disputed facts, but his decision is final and binding and there is no right of appeal anywhere. There is no review or final arbitration or any further court proceedings unless the expert answers the wrong question. It is therefore a procedure usually confined to single simple issues, like the proper level of rent or appropriate accounting method. An adjudicator, on the other hand, makes an interim decision, and has to deal with any dispute arising under a construction contract, often complicated and difficult issues. It may be that his decision provides a permanent solution which is never reviewed because the parties accept it, but the important fact is that, under the statute, the parties to adjudication have the right of a final review by arbitration or litigation whichever is applicable.

There are no particular rules for expert determination. It is up to the expert to decide the procedure unless provided with a process to follow upon his appointment or in the enabling agreement/clause for expert determination. An adjudicator need not act judicially but must act 'impartially' and there are usually rules which apply, whether the JCT Rules, the CIMA rules, the statutory scheme, or TeCSA rules. Under these the adjudicator should obtain submissions from both sides or may hold a hearing. He must give his decision within 28 days of the date of referral (unless the period is extended). Like arbitrators, adjudicators are immune from suit and cannot be required to give evidence in court or before an arbitrator.

Certain aspects of adjudication and expert determination may come under the scrutiny of the courts if the wrong question is answered and for the purposes of enforcement by summary judgment.

There was an interesting comparison made between the expert determination process and adjudication by Mr Justice Dyson in the TCC in the case of *Bouygues (UK) Limited v. Dahl Jensen (UK) (in liquidation) Limited* (2000). The fact that the adjudicator in that case had miscalculated the figures giving the wrong answer was not a question going to jurisdiction; he had answered the right question, but wrongly.

6.3 Arbitration

The traditional option for the settlement of disputes in the construction industry is arbitration. Its beginnings go back to the 1860s when the General Builders' Association considered the 'contract question' and recommended amongst other conditions that provision should be made in building contracts for 'independent arbitration'. It was perhaps, the preferred traditional choice until the late 20th century when the Joint Contracts Tribunal made the process open to litigation.

For a long time the courts held that if there was an arbitration clause in the contract an issue could not be referred to litigation unless both parties wished it, i.e. in any action if the defendants claimed that it should not proceed because the contract provided for arbitration they would be successful (e.g. *Northern Regional Health Authority v. Derek Crouch Construction Co* (1984). However this was reversed by *Beaufort Developments (NI) Limited v. Gilbert Ash* (1998), symptomatic perhaps of the court's more active role under the Woolf Reforms.

The process is generally governed by the Arbitration Act 1996 which gives arbitrators statutory powers to conduct arbitrations in accordance with the particular nature of the case and the wishes of the parties. The Act, principally drafted by Lord Saville, attempts to codify arbitration law. It probably succeeds to the extent that it enshrines the general principles to which lawyers and experts can readily refer for guidance.

For the expert witness the key power of the arbitrator is section 37 of the Act whereby, unless it is otherwise agreed by the parties, the arbitrator may appoint experts to report to him, or assessors, in respect of which the parties

are given an opportunity to comment. Any expert so appointed will be the responsibility of the arbitrator so that his fees are charged by the arbitrator as a disbursement. These are the costs of the arbitration and form part of the award. The fact that the parties have been in adjudication does not affect their right to arbitrate, since the Housing Grants, Construction and Regeneration Act 1996 provides that an adjudicator's decision is only interim, i.e. binding until the dispute is finally settled or determined by litigation, arbitration or agreement between the parties.

Appointment of the arbitrator

An advantage of arbitration over litigation is that initially the parties are free to choose and agree their own arbitrator. They do not have this freedom of choice under the judicial system. If, however, the parties cannot agree, then in construction disputes the president of the appropriate body, whether the Royal Institute of British Architects, the Institution of Civil Engineers, the Institution of Mechanical Engineers, the Royal Institution of Chartered Surveyors or the Chartered Institute of Arbitrators, may appoint an arbitrator on application of the parties. He will be selected from a panel of expert arbitrators experienced in their particular fields. Very often such arbitrators themselves act as expert witnesses.

Less formality

Another distinct advantage of the arbitration process is that it progresses through its stages in a less formal environment. At the preliminary stages solicitors usually appear before the arbitrator and if counsel's attendance is necessary he is not robed or wigged.

It is sometimes the complaint of the industry that lawyers 'hijack' arbitration. It may be, however, that lawyers are essential to keep the arbitration in focus on the issues. Unlike litigation the parties can apply their own rules or adopt industry models e.g. the JCT 1998 edition of the Construction Industry Model Rules (CIMA) of the Rules of the Chartered Institute of Arbitrators. Alternatively they can make their own rules insofar as they comply with the general principles of natural justice recognised by the common law and practice and procedures under the Arbitration Act 1996.

An expert witness, not being a member of the legal profession, may find the atmosphere of an arbitration like a business meeting rather than a courtroom. Parties are encouraged in the interest of saving time and cost to take preliminary issues with shorter hearings (for example by application of Rule 7 of the CIMA Rules) or on documents only (applying Rule 8).

Procedural stages

For ease of reference and general guidance the expert witness should be aware of the stages in an arbitration so that he knows when he will have to do the greatest amount of work. The expert is usually working regularly on a major case from the date of his instructions but, like every process, it has its particular demands.

The stages are:

- Investigation and identification of matters in dispute.
- Assessment of quantum and value.
- Preliminary appraisal, forming a preliminary report utilised for points of claim.
- Appointment of suitably qualified arbitrator dependent on type of discipline involved, e.g. design or workmanship.
- Preliminary directions hearing (expert may attend).
- Service of points of claim.
- Service of points of defence and counterclaim (which the expert will review, assessing merits of counterclaim, e.g. any rights of set-off, etc.).
- Service of reply to defence and defence to counterclaim (again the expert will assess these as affecting technical issues).
- Disclosure of documents (the expert may attend on disclosure in order to assist obtaining/examining particular evidence, e.g. accounts and technical reports).
- Provision of a Scott Schedule, drafted by counsel with the expert's assistance (see Chapter 10).
- Visiting the site.
- Exchange of experts' reports and witness statements (a prerequisite to the admission of evidence; the expert will review these prior to meeting other side and attempting to agree facts/figures).
- Legal submissions (where these concern the facts the expert will be consulted as necessary).
- The hearing (it is useful for the expert to attend the opening of the case for each side and thereafter to attend as necessary and required by the client's lawyers).

The expert should carefully note in his diary the relevant dates given at the directions hearing for service of submissions, for example points of claim/defence etc., and the dates for exchange of experts' reports, site visits, exchange of statements of evidence, experts' meetings and the hearing itself.

Preparation for the hearing

The method of preparation is a matter for the individual expert trained in his particular professional discipline. His preparation, however, in some respects will reflect the work of counsel in evaluating the documentary and

other evidence upon which he bases his technical opinion. He must remember that his duty is primarily to the tribunal and that his correct procedure is to perform as an expert and not as the client's advocate.

In many respects the method of preparation for an expert will be the same whether the process of resolution is adjudication, arbitration, or litigation, the essential differences being timescale and formalities. In arbitration the expert will be guided by the client's instructions, solicitor and counsel, and by the arbitrator's directions.

As in other areas of civil justice the state appears to have retreated from its 'supervisory jurisdiction' of arbitrators to adopt what is considered a more modern approach to the old problems of ensuring fairness and public confidence in the process. The Arbitration Act 1996 empowers arbitrators to act independently of the courts and gives them power to act in an interventionist, pro-active way if the arbitrator considers that a more efficient and effective means to adopt. For example:

- section 33 (general duty of the tribunal to act fairly and avoid unnecessary delays);
- section 34 (power to decide procedural and evidential matters, subject to the parties' right to agree);
- section 38(3) (power to order security for costs);
- section 41 (power to make peremptory orders and impose sanctions in costs and otherwise, including dismissal of the claim, in the event of a party's default).

The courts seem to have shied away from interference at the interlocutory stages of arbitration. Appeals are very rare in such cases, as are applications to remove arbitrators. This does not necessarily mean that standards have improved, but reflects state policy that dispute resolution by commercial men can be recognised as a self-governing process, provided that it does not offend the fundamental rules of justice or law.

The nature of the hearing

In many respects an arbitration hearing is similar to a court hearing. It is presided over by a person exercising a judicial function even though he is not a judge employed by the state. The proceedings are judicial and follows the adversarial process, respecting the rules of natural justice by reason of which each side is given a fair chance to put their case. Counsel usually represents the parties and oral evidence is given by way of production of witness statements, cross-examination and re-examination. The arbitrator may also wish to clarify certain matters and ask questions at his discretion as does a TCC judge. The conduct of the hearing is, however, generally less formal, a reason being the need to save time and costs. The conduct of the arbitration is approached on a similar basis to that of proportionality in so far as the arbitrator, under section 33(1) Arbitration Act 1996, has to

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

At the arbitration hearing the claimant's counsel or solicitor or other advocate must open the case by summarising the issues and putting the best argument forward in favour of his client's case which can be supported on the evidence to be adduced. He will then call his witnesses of fact who will be followed by the expert witness. The respondent may cross-examine each witness after the claimant's counsel has examined in chief. Claimant's counsel can re-examine after cross-examination. The arbitrator may also ask some questions but this is rare. The respondents follow the same procedure for examination-in-chief and re-examination. The respondent's counsel at the close of his case sums up and he is followed by the claimant's counsel who sums up his client's case.

The arbitrator may then decide to hold a site visit and examine what is disputed or, if he has already done so or it is not otherwise appropriate, he will adjourn the proceedings to consider his award.

The award

Unlike a judgment in litigation which is published in law reports and commented upon by the legal press, the award in arbitration proceedings is confidential to the parties and delivered by the arbitrator in written form. So far as the parties are concerned it is often this privacy which is seen as the major advantage of arbitration as opposed to litigation. However, unlike a judge, the arbitrator needs to be paid by the parties and section 56(1) of the Arbitration Act 1996 enables the arbitrator to withhold his award until he is so paid. This is only practical since it can be imagined that the losing party would be most reluctant to pay or contribute to the arbitrator's fees.

The award can also deal with the costs of the arbitration under section 61(1) and unless the parties otherwise agree this is on the general principle that 'costs follow the event', i.e. the loser pays the successful party's costs. However there is the proviso that this does not apply 'where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs'. Such circumstances would be where a sealed offer (see Chapter 1) has been made which was the same as or more than the final award.

Once his award is published to the parties the arbitrator is *functus officio*, his work is complete and he cannot act further in the matter.

The arbitrator's award may be enforced by the successful party by application to the High Court under section 66(1) Arbitration Act 1996. The Civil Procedure Rules provide that applications for leave to enforce awards under the various Arbitration Acts may be made in the Royal Courts of Justice or in any district registry of the High Court. Such applications may be made without notice.

The arbitrator's immunity from suit

An arbitrator actually determines a dispute after hearing evidence from both sides in a judicial manner. As a matter of public policy he cannot be liable for negligence because he is carrying out a judicial duty. In arriving at a conclusion in the same way as a judge he cannot be liable in negligence for a judicial act, although he can be liable for a negligent administrative act, e.g. failure to notify parties of hearing. Two important House of Lords cases clarified the position on liability. In *Sutcliffe v. Thackrah and Others* (1974) the House of Lords ruled that an architect issuing interim certificates does not act as an arbitrator between the parties. Lord Morris clarified the position by stating:

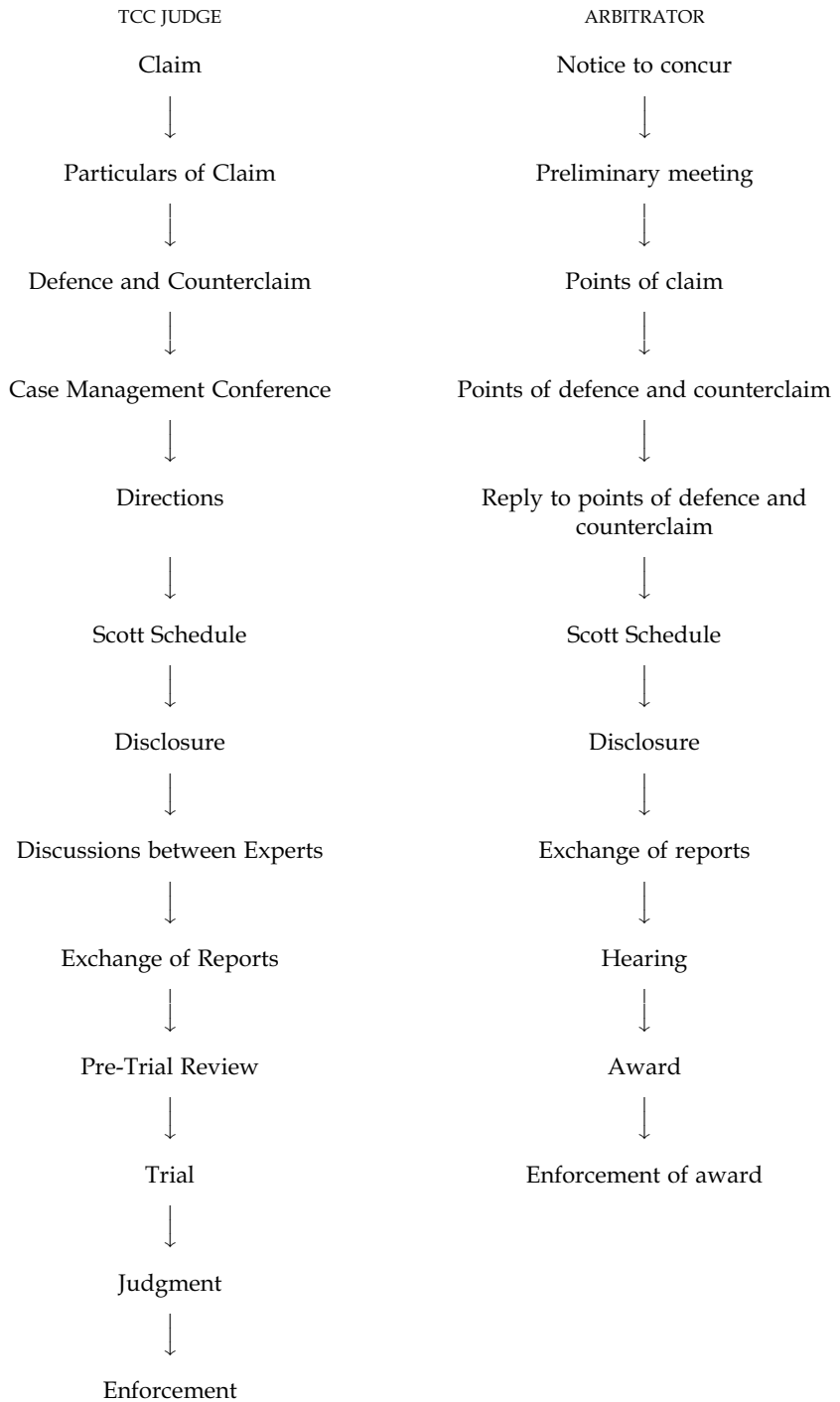
A person will only be an arbitrator or quasi-arbitrator if there is a submission to him either of a specific dispute of present points of difference or defined differences that may in future arise and if there is agreement that his decision will be binding.

In the case of *Arenson v. Arenson* (1973) it was argued that what clothed a real arbitrator with immunity was not only matters of public policy but also the fact that the arbitrator was a type of judge who did not decide the question before him solely by himself. He had to deal with the contentions of the parties, and that was why the concept of a 'quasi-arbitrator' was argued not to be a justifiable proposition in law. It was further argued that *Hedley Byrne v. Heller* (1964) (see Chapter 3) had established that all persons who expressed an opinion which was negligent were liable to persons who were within a relationship recognised by the law. An expert appointed by one side would do well to remember that he cannot be acting in any sense in a judicial, or so called quasi-judicial capacity, for the fundamental reason that he does not hear both sides of the case, nor are the parties bound to accept his advice. Lord Wheatley defined the judicial tests in *Arenson v. Arenson* where he said that the tests were:

- (1) the existence of a dispute or difference between the parties which they have formulated in some way or another;
- (2) such dispute or difference must have been remitted by the parties to the person to resolve in such manner that he is called upon to exercise a judicial function;
- (3) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and
- (4) the parties have agreed to accept his decision.

It must be the case, therefore, that an expert witness employed as such does not and cannot act in an arbitral or judicial capacity; he has no immunity from suit; he is liable just as any other professional person under the rule in *Hedley Byrne v. Heller* and indeed must exercise the particular standard of care referred to in Chapter 3.

Summary of procedure



6.4 Litigation

As Judge Fox-Andrews has written (in his article in *Construction and Engineering Law* 5 (2) May 2000) it is probably the case that the Official Referees were in the forefront of procedural law affecting expert witnesses. This is no surprise since the court was the invention of Lord Cairns and his colleagues of the Judicature Commissioners who revolutionised procedure in the Supreme Court with Special and Official Referees. It may be that the idea was borrowed from the chancery court, but the practice of Official Referees considerably extended the utility of the expert witness in hearing complex litigation.

The development of the Technology and Construction Court

The original jurisdiction of the Technology and Construction Court derived from the Judicature Commissioners' recommendation in 1873 that the High Court should have permanent officers attached to the Supreme Court called Official Referees. The function of the Official Referees was set out in sections 56 and 57 of the Judicature Act 1873 which provided that either the High Court or the Court of Appeal or a Divisional Court or judge before whom a cause or matter was pending for an enquiry and report could refer a matter to an Official or Special Referee for a report which might be adopted in whole or in part. So far as the High Court jurisdiction was concerned these would be those matters:

requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers

This was a wide jurisdiction but confined to matters of fact which could not easily understood by a jury.

The basis of the Official Referees' modern jurisdiction is to be found in section 9 of the Supreme Court Act 1884 which provided:

In any cause or matter (other than a criminal proceeding by the Crown) now pending or hereafter commenced before the High Court of Justice or Court of Appeal in which all parties who are under no disability consent thereto the Court or a judge may at any time, on such terms as may be thought proper, order the whole cause or matter to be tried before an official referee who shall have power to direct in what manner the judgment of the Court shall be entered and to exercise the same discretion as to costs as the Court or judge could have exercised.

From its inception the work of the court was concentrated on complex and heavy factual cases requiring detailed forensic examination. In 1948 the

number of Official Referees was increased from 3 to 4 because of the increasing building contract workload.

The Courts Act 1971 abolished the office of Official Referee and they became classified as circuit judges. In practice, however, the title remained till its replacement in October 1998 when the court itself was renamed. This Act also provided for the appointment of provincial Official Referees outside the South Eastern circuit.

The business of the TCC

The modern jurisdiction of the Technology and Construction Court is set out in Part 49 of the Civil Procedure Rules, supplemented by Practice Direction 49C (see Appendix II). Rule 49(2)(e) of the CPR provides that specialist proceedings include 'Technology and Construction Court Business (as defined by the relevant practice direction)'. The Practice Direction states that a TCC claim is a claim that involves issues or questions which are technically complex or for which a trial by a judge of the TCC is for any other reason desirable.

TCC claims may be dealt with either in the High Court or, subject to paragraph 2.3 of the Practice Direction, in a County Court, so it is possible that the expert could find himself there. It is conceivable that in the next few years the jurisdiction of the County Court will be extended or there may be an eventual merger of the courts, with complex specialist work being undertaken by High Court and Circuit judges. For the present, cases allocated to the TCC will, unless and until a judge of the TCC otherwise directs, be dealt with by a judge of the TCC.

The business of the court generally entails:

- cases requiring prolonged re-examination of documents;
- cases requiring prolonged examination of accounts;
- cases requiring a technical or scientific investigation;
- cases requiring local investigation;
- the assessment of complex damages after an interlocutory judgment.

Most of the work of the TCC remains construction and engineering litigation entailing a prolonged examination of documentary evidence and analysis of expert opinion. This is not exclusive, however, because the work of the court frequently includes dealing with appeals from domestic arbitrators and other matters relating to arbitration.

The important engineering and construction jurisdiction not only includes the typical engineering and construction dispute, involving matters of the law of contract and tort but also damages claims arising out of complex multi-disciplinary issues. In such cases it is necessary to analyse and apportion liability between distinct disciplines, e.g. mechanical and electrical engineering. Substantial claims can arise, moreover, in the public sector involving council estates, hospitals, railways, tunnels, bridges and complex government construction projects.

The rules and Practice Direction are further augmented by a Pre-action Protocol (see Appendix IV) stating the appropriate pre-action steps to be taken by solicitors and intended litigants. This entails, as expected, an emphasis upon careful preparation and a more co-operative approach between the parties to narrow issues in dispute and give reasonable notice of the claims that are being made, as well as provision for encouragement to settle what is capable of settlement.

The TeCSA expert witness protocol

This protocol is not a court protocol but one promulgated by the Technology and Construction Solicitors Association (TeCSA), the re-named Official Referees Solicitors Association (ORSA). This Association was formed to promote the interests of solicitors and their clients conducting business before the Official Referees and now in the Technology and Construction Court. The protocol arises out of the ORSA response to the Issue Paper on Expert Evidence released by the Access to Justice Team in 1996. It was hoped that the protocol would encourage the independence and impartiality of the expert. Further information is available from the TeCSA website (www.tecsa.org.uk).

The protocol (see Appendix III) provides for

- the selection of an expert who is competent to act in the particular case and circumstances;
- the avoidance of any conflict of interest and the preservation of confidentiality;
- the provision of information by the expert such as may be required by the solicitor to help him assess the expert's suitability;
- the details to be included in the brief to the expert;
- the timescale;
- the hearing date;
- reports;
- without prejudice meetings and notes thereon;
- the expert's duty and reporting;
- fees and the provision of a budget by the expert and security from the client;
- the implications of any legal expenses insurance and public funding.

Proportionality and the expert

In line with the overriding objective public interest demands achieving a proportionate balance of court resources in litigation. The Woolf Report considered that experts and discovery were perhaps the two chief causes of waste of resources, part of the litigation claims support industry. Thus experts and those who instruct them must have careful regard to the

appointment of suitably qualified experts, their fees and their overall added value in proportion to the merits of the case.

Rule 35.1 of the CPR provides that expert evidence shall be limited to that which is reasonably required to resolve the proceedings. Numbers of experts and issues to be addressed can be restricted. To this extent the court is concerned to control the numbers of experts in proportion to the merits of the issues and their relative financial and substantive importance. For the purposes of this rule, reference to an expert is to one who has been instructed to give or prepare evidence for the purpose of court proceedings, and whose instructions in that respect may be open to court review.

The judiciary are keen to ensure that the case runs properly, i.e. the issues are clearly defined and the evidence relied upon is relevant and admissible. This is essential for effective case management despite some contradiction with the traditional adversarial approach. Judges have been known, especially in commercial cases, to restrict expert evidence e.g. *Brown v. Gould & Swayne* (1996). The Commercial Court particularly is keen to ensure that the areas of expertise upon which experts will give evidence are written into the directions. This, in practice, limits expert evidence at the outset and focuses the minds of the parties and experts on central issues.

Where three or more experts per side are involved the Commercial Court will discuss with the parties whether one expert might cover more than one discipline. In building cases this might be more difficult but it is thought that in these days of design and build and management contracts it may well be that a project manager or lead consultant can give appropriate evidence. In other cases where the issue involves several disciplines (such as civil, structural, mechanical and electrical engineering) it may be very difficult for the court or the parties to agree an expert of one particular discipline to cover the others. In such cases it may be possible for the court and the parties, in the interest of the overriding objective, to identify more precisely issues of difference, isolating the more important from the less important opinion issues, so that if the key issues can be determined the lesser ones can perhaps be more rapidly resolved.

The court can also control the length of proceedings, resources and costs regarding the use of experts. Rule 35.4 of the CPR provides that no party may call an expert, or put in evidence an expert's report, without the court's permission. When a party applies for permission under this rule he must identify the issues for which he wishes to call expert evidence and, where practicable, the expert in that field on whose evidence he wishes to rely. If permission is granted under this rule it is in relation only to the expert named or the field identified. The court may also limit the amount of the expert's fees and expenses that the party calling the expert may recover from any other party. Judges may be shy of these powers at first but they must exercise them in the interests of commercial sense and proportionality. One of the most significant elements of cost in construction cases has been the heavy expense of experts, often disproportionate to their status and value. There is a real need here for judicial intervention and control to ensure that costs are kept to a reasonable and appropriate level. Judges, particularly in

the TCC, from their long experience with all kinds of experts are conscious of the abuse that may happen if there is a profusion of experts.

There also appears to have been a tendency for some individuals to hold themselves out as experts at a relatively early part of their professional careers. As stated in Chapter 1, such claims should be viewed with some scepticism, since membership of expert organisations cannot be a substitute for professional and practical experience. Nevertheless such membership, with its educational facilities, may accelerate the potential expert's knowledge, and make him better at his job and of greater assistance to the court at the right time.

The expert's role in the TCC process

In a building defects case the expert may have been instructed to advise initially on the question of technical responsibility. He will then be asked to advise further during the course of any remedial works and upon the preparation of evidence.

Under the new rules the claimants must comply with the Pre-action Protocol (see Appendix IV). This entails exchange of information and particulars of the claim and defence to narrow or resolve the issues. An expert's preliminary report may be disclosed waiving privilege if appropriate to invite an early resolution. A third party mediator may be asked to assist and only if all fails may the claimant decide to proceed. If the claimant proceeds the procedure follows the following outline stages.

- Issue claim form and particulars and service of the same.
- Issue and service of defence and counterclaim.
- First case management conference when directions will be given for future conduct of the action.
- Service of further submissions in accordance with the case management directions.
- Pre-hearing conference and listing questionnaire.
- Trial.

It has been suggested that the procedure in the Technology and Construction Court does not entail much change from the Official Referees Court. It is the view, however, that the Civil Procedure Rules are a new procedural code so that the judges will interpret them as they see fit. It is they who are in charge of the case, not the lawyers. This must make for a difference of culture whereby the expert witness is very much the servant of the court and not only the adviser of one or other of the parties. His obligation to the court is paramount (see rule 35.3, Appendix V).

If the expert acts for the claimant, he must:

- (1) advise on the particulars of claim and see that it is factually correct and that it puts forward the technical argument;

- (2) advise and comment on the defence and counterclaim so that counsel can formulate a reply and defence to counterclaim and raise requests for further particulars of such pleadings if necessary;
- (3) assist in preparing a Scott Schedule as required.

If the expert acts on behalf of the defendant, he may:

- (1) comment upon the particulars of claim so that a request for further and better particulars can be made;
- (2) advise and check the defence and counterclaim;
- (3) comment upon any reply and defence to the counterclaim and assist with any request for further and better particulars of the pleadings;
- (4) assist with replies to the Scott Schedule.

The Scott Schedule, which itemises the issues in dispute between the parties, will be drawn up in the form as directed by the court or as agreed between the parties. Indeed, it would be difficult to conduct the trial of a complex construction case without the assistance of a Scott Schedule (see Chapter 10).

The Scott Schedule prepared by the claimant is served upon the defendant who is required to answer each scheduled allegation pursuant to the court's directions. There is also 'disclosure' of documentary evidence (which used to be known as 'discovery'). This is an important matter for the expert and lawyers which should be carried out as soon as possible, ideally by both solicitors and expert working together (see Chapter 9).

Following completion of disclosure there will usually be a meeting of experts of like discipline. Prior to compliance with the formal order for a meeting of experts, the experts may well have met to discuss obtaining evidence on site, the extent of remedial works required and also negotiated in an attempt to agree facts or figures. Having exchanged reports, the experts will have a knowledge of each other's opinion. The meeting may then proceed to clarify for a joint report agreed issues, remaining differences of opinion and the basis for such differences. (See Chapter 7 on experts' discussions.)

6.5 *Alternative dispute resolution*

Much has been written and said about ADR but statistical evidence is by no means conclusive and there is much contradictory anecdotal evidence as to its utility. Despite the publicity and state promotion there has been little real debate about the merits of ADR in the legal profession.

Professor Michael Zander in his recent Hamlyn lecture series considered that ADR was still the 'flavour of the month'. However, from a sceptical viewpoint, it has been the flavour of the month for the last 20 years and its impact on the English legal system has still been minimal whereas in the comparative common law jurisdiction of the United States ADR has been used for many years. It seems to work better at a higher corporate level

where the commercial relationship is very important. However, it would not be right for an English lawyer to make too many presumptions based on the American experience without detailed analysis of the US evidence.

The development of formal ADR

Alternative means of resolving disputes, other than litigation, are not new. It has always been open to litigators to realise that their client's commercial interests might not be best served by such a confrontational process and so settle the parties' differences by negotiation. What has, however, developed over the past 25 years is the idea that this process can be helped by outsiders, trained mediators who specialise in facilitating such dispute resolution and who charge fees for their services.

American origins

It is worth noting that the lead for ADR came in America from Chief Justice Warren Berger and the Dean of the Harvard Law School, Derek Bok: an eminent judge and an eminent academic.

In 1976 the Chief Justice of the United States wrote a paper entitled: *Agenda for 2000*. He followed that in 1983 with his paper: *Isn't there a better way?* In 1983 Rule 16 of the Federal Court Rules was amended to empower judges to utilise pre-trial conferences to facilitate settlement. The rules of this court were then changed to provide that no less than 30 days before the date for trial any party could serve the other with an offer for settlement. This parallels the English civil procedural code whereby a payment into court could be made and now under part 36 either party may make offers to settle before trial not less 21 days before the trial. Settlement can be perceived as a permanent truce rather than a definition of the parties' rights: it is not a victory or defeat. Settlement cannot be preferable to judgment in terms of a precise definition of legal rights, but it is essential to achieve in most if not all cases where the amount of time, money and resources required for trial are disproportionate to the matters in issue. From the state point of view there is the prospect of saving taxpayers' money and reducing the court service budget.

The Harvard view

In 1983 Derek Bok considered that there were difficulties in the modern practice of law and suggested that lawyers be trained less as legal adversaries but more as reconcilers and mediators. It may be said that perception of lawyers in the United States was that they would fight the case whatever the merits and this perception although not generally justified was the key factor in lawyers learning other methods of dispute resolution. In many respects Dr Bok and Harvard supported the policy of Chief Justice Warren

Berger. Concern were expressed by Professor Fiss of Yale that there is more inequality in the bargaining mediating process since the resources of the less wealthy are necessarily weaker than those of the richer and only an independent state judge with the power of the state at his disposal can stand against such inequalities and give an impartial independent judgment. Nevertheless the ADR movement has become more popular in the legal culture of the United States and has been increasingly promoted in Britain by lawyers and construction professionals. No profession seems to have a monopoly of it.

The Woolf Reforms

Lord Woolf considered that ADR had a key role to play in resolving disputes that would otherwise come to court and take up a disproportionate resources, stating in Chapter 1 of his Report:

Two other significant aims of my recommendations need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation, for example by greater use of pre-litigation disclosure and of ADR, and that of encouraging settlement, for example by introducing plaintiffs' offers to settle, and by disposing of issues so as to narrow the dispute. All these are intended to divert cases from the court system or to ensure that those cases which do go through the court system are disposed of as rapidly as possible. I share the view, expressed in the Commercial Court Practice Statement of 10 December 1993, that although the primary role of the court is as a forum for deciding cases it is right that the court should encourage the parties to consider the use of ADR as a means to resolve their disputes. I believe that the same is true of helping the parties to settle a case.

Conclusion

The conclusion one reaches from the ADR debate so far is that it has run parallel almost with the Access to Justice debate. In some ways the debates have overlapped and perhaps run counter to each other. In construction in particular there has been a considerable increase in all kinds of dispute consultant; some practising as arbitrators, some as adjudicators and some as mediators. The legal profession has taken to ADR cautiously and late in the day: in America lawyers practically invented it whilst in England most practitioners have been spectators. ADR has no doubt had some influence on judges' thinking and it seems that the nature of a court of law is changing to a more managed and diagnostic process, actively encouraging settlement. There is, however, some degree of uncertainty as to that course. It is thought that the courts have to be careful as to how far ADR is promoted by them and how far they can promote settlement. Traditionally in the English adversarial system that has not been the role of the court but of the parties and their lawyers.

Conciliation and mediation procedures

In 1990 the Chartered Institute of Arbitrators, after careful consideration and consultation, published its guidelines for conciliation and mediation. Those guidelines provide for parties to resolve their disputes or differences arising out of matters of contract or other legal relationships amicably without recourse to litigation or arbitration. That is the objective and the ideal but it is not necessarily guaranteed.

The CEDR (Centre for Effective Dispute Resolution) have lists of mediators who can be appointed and their website (www.cedr.co.uk) gives guidelines and information of fees etc. for those considering referring a dispute to mediation. The British Academy of Experts also provides training for, and maintains a register of, Approved Mediators and the construction industry is offered a nationwide service by leading construction contract consultants.

Whilst the objective of mediation is to resolve disputes without recourse to litigation or arbitration, this may not always be achieved but experience in the United States has shown that when parties have agreed to try the process the issues can be resolved speedily.

Mediation is a process by which the parties, assisted by a neutral third person, endeavour systematically to identify points of agreement and disagreement, with a view to exploring alternative solutions and considering compromises. The aim is to reach a mutually agreed settlement on the issues relating to the conflict.

Depending upon the mediation clause or agreement the parties may adopt particular rules for mediation, e.g. those published by various mediation bodies, but generally the parties will find the process informal and flexible. They may be represented or assisted by lawyers if they so wish.

Mediators usually open discussion by explaining how the process works. Some sessions are held with the parties and the mediator, others are in private session or caucus. All communications are confidential and without prejudice to a party's right to litigate or arbitrate. Information may be confided in the mediator and not communicated to the other party unless the mediator is expressly authorised to do so. The mediator will tell the parties the ground rules and caution against any personal animosity or abuse, although in rare cases expressing this may 'clear the air' and pave the way for a settlement.

The mediator must not have a conflict of interest. He must not be advising one of the parties in any case or have previously acted for a party as, for example, a lawyer, without disclosing that interest. The parties should assure the mediator that they genuinely wish to seek a resolution of the dispute through mediation and demonstrate a positive and constructive approach to resolving the issues between them.

The referring party will be asked to state his position. The parties have the opportunity of agreeing a process, will deal with the issues and set an agenda. Although lawyers may be present and make submissions representing their clients the mediator will want to hear directly from the parties themselves.

Where the parties are corporate bodies those individuals representing them must have full authority to act on their behalf and be given wide parameters within which to reach a compromise settlement of all the issues in dispute. Mediation cannot work if those present have to refer back to other people for their agreement.

The mediator may chair a discussion between the parties on the history of the dispute. In this process of allegation and counter-allegation some misunderstandings may be resolved. The mediator is neutral and may probe the parties with open-ended questions and summarising the issues at appropriate stages.

The mediator's task is then to identify what is really behind the dispute and what holds the key to breaking any deadlock and resolving the matters in question. In a major commercial dispute where large commercial organisations have a long-standing relationship with each other there may be considerable flexibility in reaching a deal based on reciprocity and compromise.

The task of the mediator is to resolve the dispute by generating options for resolution on the basis of 'what if' proposals or suchlike contingencies. This may bring the parties to a deal and save the costs of litigation or arbitration. If the parties reach agreement the mediator will draft an agreement ensuring it reflects the understanding between them.

6.6 Conclusion

The expert witness in the construction industry today must be equipped with the professional skill as an expert in his field and be knowledgeable of the various procedures that may govern his work. The procedures often set tight timetables and thus the expert needs to be familiar with the different procedures merely outlined above. Above all the expert must be conscious of the commercial pressures on both the parties and the system.

Chapter 7

Experts' Discussions and the Single Joint Expert

7.1 *Experts' discussions*

As stated in earlier chapters, an important part of the expert's work will be discussions with his opposite number, to define and, if possible, reduce the issues in contention.

Court powers

The Official Referees' approach

Long before the advent of the Woolf reforms it had been the practice in the Official Referees' court for meetings of experts involved in any case to take place at the order of the judge. The notes to Order 36, rules 1 to 9 of the Rules of the Supreme Court stated that on the summons for directions the Official Referee would usually

Make orders limiting the number of experts; requiring that those of like disciplines should meet without prejudice with a view to agreeing technical facts and narrowing issues; and that reports should be exchanged.

The Official Referees' authority to do this derived from Order 38 on Evidence, rule 38 of which stated:

In any cause or matter the Court may, if it thinks fit, direct that there be a meeting 'without prejudice' of such experts ... for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place the experts may prepare a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement.

That this optional procedure became almost standard practice in cases before the Official Referees was symptomatic of the pragmatic, 'hands-on' approach of that court and was a necessity when dealing with factually complex engineering and construction cases.

Civil Procedure Rules Part 35 rule 12

Under the new regime the terms of Order 38 rule 38 have been tightened up and expanded. Rule 35.12 (1) of the CPR (see Appendix V) provides that the court may at any time direct that discussions shall take place between experts. The purpose of such discussions is to enable the experts to identify the issues and where possible reach agreement on them. The court can now, however, direct the experts to discuss specific issues. The court can also direct the experts to state what matters they are agreed upon and where they disagree. If they disagree they must give a summary of their reasons for not agreeing.

If the experts reach agreement, this does not bind the parties. The parties themselves must approve the terms of any agreement reached by the expert. The contents of their discussions cannot be referred to at trial unless the experts agree.

Such intervention by the court may be geared to keeping the experts focused on their role and the relevant issues in the case. It may well be that an experienced expert in construction cases has views about the conduct of the case but the management of the case is a matter for the client's lawyers and not for expert witnesses.

The purpose of the rule

Bearing in mind the idea of proportionality and the overriding duty of the expert to the court, experts no longer have to actually meet to agree or disagree anything; what they must do is discuss the issues in an attempt to resolve any differences of opinion. Rule 35.12 refers to the court directing a 'discussion' and the more the experts discuss, the more they are likely to understand each other's opinion and to see why resolution is possible. They are also able to consider the effect of their work and how it facilitates resolution or protracts matters. If the latter is the case, it is suggested that consideration be seriously given to the balance between the costs (in time and effort) and the result. It may be possible to foresee further difficulties in which case the client has a right to know how much such matters may cost to resolve.

There are some clear distinct duties imposed on experts in respect of their discussions, unlike the former practice of the Official Referee directing meetings to agree facts as facts or figures as figures and directing the experts to make a statement as to what was and what was not agreed. It is preferable if such discussions take place before the completion or exchange of experts' reports when their views are likely to crystallise and become entrenched. The court may give a timetable to the experts for discussions.

Unlike Order 38 rule 38, the experts now have a duty to identify issues in the proceedings, not merely those parts of their opinion evidence which are an issue. Where possible, the experts should reach agreement. Also the experts now not only have to say what was agreed and what was not, but if not, why not.

An agenda should if possible be agreed by experts and solicitors but if it cannot be, the court can direct the experts to certain issues, i.e. the judge can now set the agenda. An example would be what codes of practice apply, what were the design criteria at the time, what were if any the design alternatives, and what were the warning signs.

The rules give positive encouragement to agreement. Experts of like discipline may meet, followed by meetings of experts of various disciplines. They may be able to make a statement to agree certain issues of principle and prepare a note signed by each of them as to matters of opinion on which they are agreed. If an expert or a party unreasonably withholds consent to an agreement, and it transpires at trial that such refusal had no justification or merit on the facts, then that party may be impugned in costs.

Rule 35.12 (4) provides that discussions between the experts shall not be referred to at trial. To that extent, the former rule regarding 'without prejudice' meetings is maintained, but an expert should always be aware of the scope of his authority. He may be personally bound if he warrants authority, but has no authority from his client.

The Draft Code of Guidance

Although not yet converted into a formal Practice Direction, the Draft Code of Guidance for Experts Under the Civil Procedure Rules 1998 was put out for consultation by the Lord Chancellor's Department in 1999. It provides invaluable guidance for experts and those instructing them as to the practical implementation of the CPR and the overriding objective and is reproduced in full in Appendix VI.

So far as experts' meetings are concerned paragraph 18 provides that:

18. The parties and their lawyers should seek to reach agreement of, and consider taking steps to clarify, the issues by way of:
 - a. conference or discussion with experts; and/or
 - b. discussion between experts for opposing parties in order to identify
 - i. the extent of the agreement between experts;
 - ii. the points of disagreement and the reasons for disagreement;
 - iii. action, if any, which may be taken to resolve the outstanding points of disagreement; and
 - iv. any issues not raised in the agenda for discussion and the extent to which these issues may be agreed.

The Code goes further to provide a process for the focus of relevant issues to advice the objective of Part 35. Paragraph 19 therefore provides:

19. The parties, their lawyers and experts should co-operate to produce concise agendas for any discussion between experts, which should, so far as possible:

- a. be circulated 28 days before the date fixed for the discussion;
- b. be agreed 7 days before the date fixed for the discussion;
- c. consist of questions which are clearly stated and apply, where necessary the correct legal test;
- d. consist of questions which are closed in their nature, that is to say capable of being answered 'yes' or 'no', and
- e. consist of questions such as to enable the experts to state their agreement or the reasons for their disagreement with each other.

The Code extends the process and provides for a constructive approach to the conduct of such discussions. This was an area previously uncharted either by Order 38 rule 38 of the Rules of the Supreme Court (see above) or by the original ORSA (Official Reference Solicitors Association) Expert Witness Protocol:

20. The discussion will take place preferably face to face except in small claims and fast track cases. Lawyers for the parties will not usually be present at such discussions.
21. If there has been a discussion, a statement of the areas of agreement and disagreement should be prepared and agreed promptly between the experts, usually before the discussion is concluded. This statement may have to be produced to the court, but shall not be binding on the parties.
22. Those instructing experts must not give, and experts must not accept, instructions not to reach agreement at such discussions on areas within the competence of experts.

The point that lawyers should not be present and that the instructions given to the experts should not require them to refer back before agreeing matters within their competence are crucial in meeting the concerns about the limited effect of experts' meetings prior to 1999 expressed by Lord Woolf in Chapter 13 of his Final Report:

Two principal reservations have been expressed, even by those who support experts' meetings in principle. The first (mentioned in my interim report) is that meetings can be futile because the experts are instructed not to agree anything; or, alternatively, are told that any points of agreement must be referred back to their instructing lawyers for ratification. This subverts the judge's intention in directing the experts to meet, because the decision as to what to agree becomes a matter for the lawyers rather than the experts. I recommended in the interim report that it should be unprofessional conduct for an expert to be given or to accept instructions not to agree, and this has been widely supported.

Likewise, in his experience, Judge Fox-Andrews found many cases where, experts failed to resolve differences after their meetings. In his leading article in *Construction and Engineering Law* he examines these causes. He suggests several reasons:

- genuine difficulties insurmountable even with discussion;
- restrictive instructions given to the expert;
- cases where, by habit or otherwise, the expert would not agree although he may have accepted his opponent's arguments.

The Code goes further than old RSC Order 38 Rule 38 or the original ORSA Expert Witness Protocol in meeting some of these concerns:

20. The discussion will take place preferably face to face except in small claims and fast track cases. Lawyers for the parties will not usually be present at such discussions.
21. If there has been a discussion, a statement of the areas of agreement and disagreement should be prepared and agreed promptly between the experts, usually before the discussion is concluded. This statement may have to be produced to the court, but shall not be binding on the parties.
22. Those instructing experts must not give, and experts must not accept, instructions not to reach agreement at such discussions on areas within the competence of experts.

The TeCSA protocol

The Technology and Construction Court Solicitors Association published a protocol (see Appendix IV) which also lays emphasis on the efficacy of experts' meetings in narrowing issues in dispute. It states, at paragraph 18:

Meetings of experts should normally take place before exchange of the experts' reports. The predominant view of TeCSA is that, if exchange takes place first, it is more likely that 'positions' are taken too early to the detriment of proper discussion at the meeting.

It goes on to say, like the Draft Code, that, although solicitors may set the agenda, 'lawyers and clients should not be present at the without prejudice meeting of experts'.

There seems to be considerable unanimity of intention, at least so far as expressed in Protocols and Guidelines, to make experts' meetings work more effectively in accordance with the overriding objective of the CPR. It may be appropriate in the course of time for TeCSA to further revise the Protocol in the light of experience under the CPR and in certain cases to extend the guidelines where necessary.

7.2 The single joint expert

Provision prior to the Woolf reforms

Under Order 40 rule 1(1) of the Rules of the Supreme Court it was possible for the Court

on the application of any party, to appoint an independent expert . . . to inquire and report on any question of fact or opinion not involving questions of law or of construction.

The expert's fees were expected to be part of the costs of the action and so subject to court order at the end of the trial, but unless and until that happened the parties would be jointly and severally liable.

The notes to Order 40 in the Rules of the Supreme Court acknowledge that 'applications under the Order have been very few in number except orders by Official Referees', but even this seems to be overstating the case.

In his experience Judge Fox-Andrews found some difficulty with Order 40. Only twice to his knowledge were court experts appointed. The first was in the case of *Abbey National Mortgages plc v. Key Surveyors Nationwide Limited* (1995). In that case Judge Hicks had to deal with an application for 29 experts. He appointed a valuer as the court expert under Order 40. The Court of Appeal upheld him on this.

The other example Judge Fox-Andrews gave in his article was a case where he appointed such an expert under Order 40 in contempt proceedings between two limited companies for failure by one to comply with the terms of a consent order. By this order one of the parties had undertaken to carry out certain repair works. Both sides advanced expert evidence from surveyors as to whether or not the works had been completed. In the event the court expert's report disposed of this dispute, but even here the judge had concerns because, if the companies went into liquidation, the court expert's fees would not have been paid. Happily they were, but the judge was not happy about litigants paying double fees.

The present position

Under the Civil Procedure Rules, in line with the more interventionist culture, the court can itself direct that a single expert be appointed:

- 35.7 (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.
- (2) The parties wishing to submit the expert evidence are called 'the instructing parties'.
- (3) Where the instructing parties cannot agree who should be the expert, the court may –

- a. select the expert from a list prepared or identified by the instructing parties; or
- b. direct that the expert be selected in such other manner as the court may direct.

By Rule 35.8(1), each instructing party may give instructions to the expert appointed by the court. The Rules make provision for copies of such instructions to be sent to the other side and empower the court to make orders as to the expert's fees and expenses and any inspection, examination or experiments which the expert wishes to carry out.

Under the new rules the parties are liable (jointly and severally) for the costs of the single expert's fees but the extent of their liability will depend on any order as to costs. The court can give directions as to payment and limit the expert's costs and expenses.

This is a practical improvement and no doubt will encourage further experimentation with the rule. Lord Woolf contemplated (in a speech to the Society of Construction Law, 4 July 2000) an increase in the popularity of single joint appointments once practitioners obtain experience of their use, although he did not expressly refer to their use in construction cases. It is thought their utility will become more popular in County Court building cases. This is a view endorsed by the authors of *Phipson on Evidence* who consider that the single joint expert's utility is with the small case not the substantial Multi-track case. They also wisely suggest that there is difficulty if such expert is not called to give his evidence orally and point to the undoubted injustice if a party is denied the right of cross-examination.

It is important to be clear what Lord Woolf said in Chapter 13 of the Final Report:

As a general principle, I believe that single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the Court directly to sample a range of opinions. The expert's duties to the court will require him to set out in his report his view of the range of possible opinions. Too often under the present regime the experts are in fact agreed upon a range of opinions but the reports only set out extreme positions

7.3 A case report on experts' meetings

Robin Ellis Limited v. Malwright

Apart from Lord Woolf's report, the Civil Procedure Rules and Practice Directions, and the Draft Code of Guidance for Experts possibly the best guide to the expert's new role is to be found in the judgement of Judge Bowsher who clarified many issues troubling practitioners in *Robin Ellis Limited v. Malwright*, handed down on 1 February 1999.

The judgment pre-dates the coming into force of the new procedural rules

by a couple of months but the draft rules had been widely circulated and the subject of extensive consultation. Judge Bowsher therefore took the opportunity to address concerns raised by the imminent changes.

The first was on the issue of privilege as it related to the discussions themselves and any joint report that resulted therefrom.

The judge ruled that the joint statement signed by the experts was not privileged, although it was an 'interim' statement it was an open document with important consequences for the parties.

Discussions leading to the joint statement were, however, protected by privilege:

To determine whether an agreement has been reached, it may be necessary to look at privileged material, but once it has been decided that there is an agreement, only the material containing the agreement is held not to be privileged.

He reviewed the case law on the matter and concluded:

Those references [in the Court of Appeal case *Stanton v. Brian Callaghan* (1999)] to the duty of the expert to the Court, and especially the words, 'there does come a point at which the expert begins to take part in the management and conduct of the trial in advance of proceedings in court' are particularly apposite in the present case. The Joint Statement which the experts were ordered to produce is a document produced for the Court to assist the Court in case management of the litigation and also in management of the conduct of the trial it is not a document which one party (or both parties) can withhold from the Court by a claim of privilege.

On the matter of whether such agreements, since they are not privileged, are binding on the parties Judge Bowsher said that this was not so:

However, just as with other experts, when they meet at an experts' meeting ordered by the Court, unless they receive express instructions giving them special additional authority, they are not aiming at reaching agreements binding on the parties. Their objective is to express opinions, agreed if possible, as to the value of the work done or not done, or of defective work, or the value of a freehold or whatever is in issue. Any agreements will be admissible in evidence but not as agreements binding the parties. Sometimes, the parties agree, either before or after the experts' meetings, that any agreements made by the experts will be binding on the parties, but that is a matter separate from the fact that the Joint Statement of the experts made after the experts' meeting is open but not binding.

He concluded:

I have been asked to give guidance as to the extent to which the experts may 'revisit' the Joint Statement which they have signed. It follows from

what I have already said that if an expert has an honest and independent change of opinion after signing a Joint Statement, whether or not it is marked 'Interim', he has a duty to record that change of view. Changes of opinion will no doubt be the subject of cross-examination at the trial should the expert be called as a witness. Whether such change of view shows an admirable flexibility of thought, or a response to new information, or a regrettable inconstancy of mind will be a matter for the trial judge to assess.

While the parties are not bound by the agreement already reached by the experts or by any further agreement reached by them in the further meetings which I have ordered, a party wishing to present a case inconsistent with those agreements will plainly be faced with considerable difficulties and I have little doubt that with the benefit of the experts' agreements the parties will be assisted in reaching appropriate compromises.

Chapter 8

Evidence and the Expert

In context many building cases are simply disputes as to facts. What actually happened to cause the defect, why did it happen, when did it happen and what was the extent of the damage?

The expert must not only answer these questions but also give his opinion on responsibility from his technical analysis of the evidence.

He must therefore have an understanding and appreciation of the general principles of evidence and show how best he can present his report based on that evidence.

He should have a working knowledge of the different categories and classifications of evidence so as to be able to distinguish which type of evidence is to be used.

8.1 *Facts in issue*

As we have seen in Chapter 5 on investigation of defects and categorisation of issues in dispute, it is essential for the expert to know what precise facts are in issue (i.e. in dispute) between the respective parties. As a matter of law the facts in issue are the facts pleaded by the parties. They are contained in the particulars of claim, the defence and counterclaim and any reply and defence to the counterclaim, and are summarised in the Scott Schedule.

The court directions

The expert, having knowledge of those disputed issues and the facts upon which the parties rely will realise what his client requires to prove his case and what the other side need for their contentions. But whereas the parties were generally free to put the case as they wished under the Rules of the Supreme Court, the expert must be aware that the court now exercises a considerable degree of control over matters of evidence. Thus under rule 32.1 (1) of the CPR:

The court may control the evidence by giving directions as to—

- (a) the issues on which it requires evidence;
- (b) the nature of evidence which it requires to decide issues; and
- (c) the way in which the evidence is to be placed before the court.

Relevance

The expert must address himself to the key question of what facts are relevant to the opinion he is to give. What is technically relevant may not necessarily be legally relevant; the evidence on which an opinion is given may be closely studied by counsel to see that there will be no problems over its admissibility:

So far as legal relevance is concerned relevant facts are those from which the existence or non-existence of a point in issue may be inferred. In essence the whole function of the expert witness concerning the matter of giving opinion evidence is based on what are relevant facts. The courts admit an expert's general view as to what the ordinary standards of skill care and diligence may be for a particular discipline in the construction industry and what would have been the proper course to pursue under the circumstances, but the expert witness cannot be asked what his own conduct would have been under such circumstances.

Where, for example, an architect expert is asked to advise whether the defendant architect was negligent in any aspect of his design or advice to his client, the architect expert will only be in a position to advise on such an allegation once he has made a thorough investigation of the building in question, examined all the drawings and contract documentation, site instructions, clerk of works' reports, and all other contemporaneous evidence, and possibly subjected certain building materials to scientific analysis and obtained results. The expert architect might well then give an opinion to the court that the architect defendant had departed from the standard of care imposed on him at common law by doing something that fell below the recognised practices and procedures (for example, in the use of untried and untested materials). His opinion would be drawn from evidence: the building is real evidence; the drawings direct evidence of fact, as are the contemporaneous correspondence, records, minutes and reports. In addition he might draw on the indirect evidence, such as results of tests on certain materials; all such direct or indirect evidence is relevant to the question of whether or not the defendant architect was negligent or not.

All facts discovered and disclosed may not be relevant. The expert must decide on technical grounds. He will be legally advised by counsel and must be mindful of the facts in issue – the facts on which allegations or claims have been formulated, and the issues of defence, counterclaim and reply. All these points will be relevant in the proceedings and must be dealt with as thoroughly as possible.

Other facts may be relevant to 'facts in issue' and these must also be investigated. For example, where an architect advises the use of a certain material which fails because, as it happens in most such cases, the material is incompatible with the subsystem, research and testing of this material would be undertaken and those findings would be relevant to the 'facts in issue'. In such a situation each side would take its own samples and have them independently analysed or otherwise agree a sample and have it tested by one laboratory and agree to abide by their results.

The evidence collated by the expert may include statements of witnesses of fact and other experts. All this will be examined by the expert and his opinion will be sought.

In general the expert must review all the evidence, whether relevant or not to the facts in issue, categorise and collate that evidence, and be ready to refer to irrelevant evidence if necessary – for example, evidence produced by the other side which is not materially relevant to the issue.

Hearsay evidence (as to which, see below) should be avoided unless it is possible to give a statement of information and belief with sources and grounds.

It may be necessary to trace the source of an explanation from several witnesses – who gave the first explanation, is it the best source? It is of importance for the expert to make his own judgment on the basis of the evidence – what he considers technically relevant and why.

8.2 Types of evidence

Direct evidence

Phipson on Evidence, defines direct evidence as meaning:

the existence of a given thing or fact (which) is proved either by actual production, or by testimony, or admissible declaration of someone who has himself perceived it.

Direct evidence is the actual evidence of a fact, for example, the object in issue such as the building. This may be provided by a witness of fact stating that he actually inspected the building in question and saw the actual problems associated with it or, for example, by the writer of a letter who gives evidence as to its content and thereby proves admissibility. The evidence must be something the witness personally experienced.

This is the best evidence that can be obtained. It is direct or real and is usually the production of the real document, piece of material or article in question. It is sometimes known as primary evidence and carries more weight than, say, indirect evidence or circumstantial evidence.

The object of providing the best evidence is:

- (1) to establish the basic facts from investigation;
- (2) to give an opinion based on those facts.

Indirect evidence

In contrast, indirect evidence is defined in *Phipson* as:

other facts thus proved, from which the existence of the given fact may be logically inferred.

Such indirect evidence of relevant facts is also described as 'circumstantial evidence'. Circumstantial evidence gives rise to presumptions of fact. Circumstantial evidence is factual evidence that is not actually in issue but is legally relevant to a fact in issue by reason of its relation to, or in connection with, the matter in question, for example, statements from persons who may have suffered similar problems or experiences which relate to the issues in dispute.

Real evidence

The real evidence is the object itself which is the subject matter of the dispute. Real evidence can be investigated either by on-the-spot investigation on a site visit of a defective building and sample testing, or by acquiring the actual object itself, for example, a defective machine or section of a faulty curtain wall or the actual hollow tiles in *Imperial College of Science and Technology v. Norman and Dawbarn* (1986) (see Chapter 4, section 2).

Every effort must be taken to ensure that the evidence is not tampered with after the defect/accident has occurred, so that there will be no dispute as to the actual state of the object itself.

As soon as possible after a dispute has arisen and both sides have appointed their experts, it is essential that the experts take a joint view of the site or subject matter in dispute. Such experts should be given reasonable notice and facilities for inspection. Obviously, the sooner such inspection takes place, with the possibility of pending remedial works, the better. Photographic evidence should be taken as soon as possible and it is advisable to take a video picture of the whole site in question. Care should be taken as to the quality of video recording. These can often be very poor. Still photographs are clearer and can be taken by the expert himself. Thus, as experts may be helped by a site visit and the gathering of evidence, so too might the judge or arbitrator be assisted in seeing the site for himself at an early date when the defects can be opened up and readily seen. Visual inspection is far more effective than a video or a still photograph.

Sometimes an expert may be asked to report on an alleged defect on the basis of the other side's expert report, but on inspection the expert may find:

- a complete lack of direct evidence;
- an entirely different set of circumstances; or
- an entirely plausible explanation for the state of affairs.

The expert must therefore approach the site of investigation with the same circumspection as a detective might approach the scene of an accident or crime.

In examining the real evidence, one must:

- (1) Examine and investigate the full extent of the defects/problem and their likely cause or causes. This must be correctly established in order

to establish and apportion blame fairly, and to specify the correct remedial work.

- (2) Consider the direct and indirect effect and consequences.
- (3) Consider legal implications in conjunction with the client's solicitors and/or counsel to establish whether there is evidence of breach of duty in contract or in tort or both.
- (4) Take sufficient detailed notes and photographs to draft an initial report and advise the client on appropriate remedial works to mitigate loss.
- (5) Make sure that those allegedly responsible for defective work and/or design are given reasonable notice so that they can inspect.

The expert must advise the client of the considerable expense that must necessarily be incurred in order to investigate the case thoroughly. The investigation work may entail opening up problem areas of the works, and in many cases such opening up work and investigation will form the basis of a separate building contract. Apart from investigation the contractor investigating may be required to remedy the problem and consequently there will be a remedial works element in the contract as well. The investigation work can be expensive depending on the nature of the problem but fees in the region of £50,000 to £100,000 are common in major building cases.

Conclusive evidence

Conclusive evidence is the most convincing evidence which is decisive in providing a fact or issue.

Extrinsic evidence

Extrinsic evidence usually consists of oral evidence given in connection with written documents and drawn from a source outside these documents to explain the point in issue.

8.3 *The expert's evidence*

Judicial view as to the expert's reliance on other evidence

In *English Exporters (London) Limited v. Eldonwall Limited* (1973) Mr Justice Megarry said:

The opinion of the expert witness is none the worse because it is in part derived from the matters of which he could give no direct evidence.

In *H v. Schering Chemicals* (1983) Mr Justice Bingham said:

If an expert refers to the results of research published by reputable authority in a reputable journal the court would, I think, ordinarily regard these results as supporting inferences fairly to be drawn from them unless or until a different approach was shown to be proper.

It may also be said, following Mr Justice Bingham's remarks in that case, that an expert holding himself out as having a particular or specialist knowledge or skill in a certain area of his profession should have the appropriate and requisite material to give his opinion and his advice. If he gives an opinion or advice without consulting the appropriate specialist references, then he himself may well find that he has failed to meet the duty of care imposed upon him and failed to advise to the proper standard of an expert holding himself out as having that specialist skill or knowledge.

Can an expert give evidence of fact and opinion?

The expert can give direct oral or written evidence of his opinion based on his findings of fact. It is clear that he can give direct relevant evidence of fact, e.g. the results of his findings on the opening up work. He can also comment by way of giving his opinion on published statistics and articles but must be wary of commenting upon hearsay (see below). See *English Exporters v. Eldonwall* (1973).

In *Harmony Shipping Co. SA v. Saudi Europe Line Ltd* (1981) Lord Denning said:

The court is entitled in order to ascertain the truth to have the actual facts which he has observed adduced before it and to have his independent opinion on these facts.

The court is entitled to have the expert's independent opinion on the documentary evidence before it. The expert's evidence on matters of fact stands in the same position as evidence of a witness of fact. Factual evidence already adduced before a court or tribunal may be commented on by the expert if required. On the other hand in cross-examination the expert may be asked to assume certain facts and then state his opinion. He should be most careful to qualify his answers in such a way as to distinguish the hypothetical from the real.

In a Practice Note given by Mr Justice Ackner (as he then was) following the decision in *Ollet v. Bristol Aerojet Limited* (1979), guidance was given as to what must be substantially disclosed by way of exchange of reports under Order 38 but it is still relevant to exchange under the CPR. The judge declared that the expert had a duty to report on the factual description of the subject of the action, e.g. a defective machine, the circumstances of the accident or problem (the defect itself), and the expert's opinion on such matters. The correct sequence of the report for exchange would therefore be:

- (1) to establish the basic facts from investigation;
- (2) to give an opinion based on those facts.

Oral evidence given on oath

Section 16 of the Evidence Act 1851 provides that every court, judge, justice, officer, commissioner, arbitrator or other person lawfully authorised to hear, receive and examine evidence is empowered to administer an oath to all witnesses that are legally called before them. An oath is defined as 'a religious asseveration by which a party calls his God to witness that what he says is the truth or that what he promises to do he will do.'

The oath

The form of oath is administered by an officer of the court. The witness holds the New Testament (the Old Testament for a follower of the Jewish religion or the Koran for a Muslim) in his uplifted hand and repeats:

I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

In the case of a person who is not a Christian, Jew or Muslim, the oath is administered in any manner which is lawful (section 1, Oaths Act 1978).

Under section 5 of the Oaths Act 1978, any person who objects to being sworn may be permitted to take an affirmation instead. If it is not reasonably practical without inconvenience or delay to administer the oath in the appropriate manner, the witness may be required to affirm. The words 'oath' and 'affidavit' include 'affirmation' and 'declaration'; 'swear' includes 'affirm' and 'declare'.

The affirmation

The form of affirmation is:

I [name] do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

So far as arbitration is concerned, section 34(2) of the Arbitration Act 1996 gives the arbitrator wide powers to decide 'all procedural and evidential matters' which includes:

(h) whether and to what extent there should be oral or written evidence or submissions

This would include, if he sees fit, examining on oath or affirmation, the parties and witnesses in the reference.

The legal significance of the oath is that, if a person breaks that oath by making a statement in the course of the proceedings from the witness box which is material and which he knows to be false or does not believe to be

true, he commits perjury. If he manufactures false evidence with the intention to deceive and mislead, that is an offence at common law.

8.4 Hearsay evidence

Section 1 of the Civil Evidence Act 1995 defines hearsay as follows:

- (a) 'hearsay' means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
- (b) references to hearsay include hearsay of whatever degree.

Basically, it is one person seeking to prove a fact that is not within his direct knowledge by reporting what another person said about it or producing a document referring to it. Since neither the second person nor the document can be tested in cross-examination such evidence carries less weight than the deposition of someone speaking from first-hand knowledge.

Prior to the 1995 Act hearsay evidence could only be given in court proceedings if complicated notice requirements had been complied with. Notice is still required in certain circumstances but this is a matter for the legal team of the client's solicitor and counsel rather than the expert and outside the scope of this book.

Experts will meet hearsay evidence in their work. When they come across it they are expected to consider it and give it the weight that is required. It is for the courts to determine whether or not the evidence is admissible but there is little doubt that judicial policy on the question is conditioned by the preference for real and direct evidence of fact and not for example evidence generated by the exigencies of civil litigation.

The Civil Evidence Act 1995

Section 1 of the Civil Evidence Act 1995 provides that in civil proceedings evidence is not excluded on the basis that it is hearsay. This is a significant change in that prior to the Act the basic rule was that hearsay evidence could not be admitted, subject to certain exceptions.

Section 2 provides that a party proposing to adduce hearsay evidence in civil proceedings must give the other party notice of that fact, and, on request, such particulars relating to the evidence as it is reasonable and practicable in the circumstances. This is to enable the other party to deal with any matters arising from its being hearsay.

Section 3 provides that where a party that uses hearsay evidence or a statement but does not call the person who made it as a witness, then any other party to the proceedings may, with leave of the court, may call that person to be cross-examined.

Section 5 (1) provides that hearsay evidence will not be admitted if the

maker of the statement was not competent as a witness, e.g. suffering from mental or physical infirmity or lack of understanding. The maker of the statement must be competent at the time he made it.

The Act defines civil proceedings as proceedings before any tribunal in relation to which the strict laws of evidence apply. The parties may for example agree that the rules of evidence apply in arbitration.

How the courts evaluate hearsay

What weight the court may give to hearsay evidence will be decided by the court's consideration of the following criteria set out in section 4(2) of the Act whereby the court has regard to the following factors:

- (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
- (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
- (c) whether the evidence involves multiple hearsay;
- (d) whether any person involved had any motive to conceal or misrepresent matters;
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

8.5 Admissibility

Who can give evidence?

As a general rule in civil proceedings, all normal adult persons are competent and compellable to give evidence. The criteria are whether the witness is able to understand the proceedings and the nature and effect of the oath, and whether he is able to speak the truth and give evidence in a rational manner.

The expert's evidence

The chief source of the law relating to the admissibility of expert evidence is statutory, the Civil Evidence Act 1972 and the Civil Procedure Rules. Expert witnesses can only depose to facts within their actual knowledge. If the facts are not within their own knowledge they must be proved independently. The expert's opinion will be based on his knowledge, experience in practice and training in his particular professional calling. According to *Phipson on*

Evidence it is permissible for an expert to give an opinion on the basis of such hearsay provided that it relates to specific matters to which he does have actual and personal knowledge or of which another witness will give admissible evidence. This is the essence, it seems, of the admissibility of expert opinion evidence and one which no expert can afford to forget.

Experts' opinions are only admissible as evidence of 'men of skill or science', to quote *Phipson*:

the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience.

This is subject to the overriding procedural rule that: 'No expert may give evidence, whether written or oral, at a hearing without the permission of the court' (rule 27(5) CPR).

The Civil Evidence Act 1972

Section 2 of the Civil Evidence Act 1972 as amended provides that notwithstanding any rules as to privilege in connection with advice given in relation to anticipated proceedings the court may make rules:

- as to the disclosure of experts' reports;
- for prohibiting a party adducing such evidence if he fails to make such disclosure in accordance with the direction.

Section 3(1) of the 1972 Act provides that where a person is called as a witness in any civil proceedings his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

Section 3(2) Civil Evidence Act 1972 provides that where such a person is called, a statement of opinion by him on any relevant matter on which he is qualified to give expert evidence, if made by way of conveying relevant facts personally by him, is admissible as evidence of what he perceived.

The Act defines 'relevant matter' as including an issue in the proceedings in question.

The powers of the court under the CPR

Significantly, and in a new departure to serve the ideal of proportionality, rule 32.1 quoted at the beginning of this chapter continues:

- (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

As a general rule evidence must be sufficiently relevant in order to be admissible. It will only be admissible as far as the court does not exclude it.

8.6 Proof

Proof is the establishment of the existence or non-existence of some fact to the satisfaction of the court. The means of such proof is the material evidence, i.e. how facts are proved, but before looking at that there are two legal aspects: the burden of proof and the standard of proof.

The burden of proof

The burden of proof has two aspects – legal or persuasive and evidential. The former is the burden to prove each particular allegation against the defendant. That burden lies with the claimant. It is for him to prove the truth of his allegations on the balance of probability – to prove both that the facts are probably as he claims and that his interpretation of the facts is the most probable and believable one.

The expert has a key part to play in this role by explaining how this is probable and why it is to be believed. What if the expert has a doubt? An expert may give evidence of his opinion even if he has a doubt, provided he makes this clear in his evidence. The question is whether *on balance* he is satisfied that his opinion is the best. A cautious expert is often more impressive than a smug, self-satisfied person who sees no difficulty in a difficult matter.

The standard of proof

The standard of proof is the degree to which proof must be established. The burden of proving a case is on the party making the allegations. The standard of proof required in civil cases is proof on the balance of probabilities.

For example, if a claimant has direct photographic evidence of each defective piece of tile on a wall and the respondent has only a limited and restricted sample of the tiles, the court is more likely to conclude on the balance of probabilities that the tiles were defective as shown on the photographic evidence produced by the claimant.

Examination of site and witness statements

In the process of examination of the site the expert will rely on physical inspection, what he actually saw, and what he observed, the taking and testing of samples, and the statements of witnesses of fact. Statements of witnesses of fact must be supplied by the solicitor in charge of the case. He should speak to all those involved directly. Interviews with clerks of works, architects, quantity surveyors, the builder's operatives and others directly involved may be useful once the expert has carried out his initial investigation.

Any such discussions the experts may have on site as a matter of evidence are classified as hearsay and would not carry much weight with the court. The expert must inform the solicitor of any such conversations so that the solicitor and counsel can decide whether statements are necessary and whether any particular person should be called as a witness. What other witnesses of fact may say may have a bearing on the expert's opinion.

Evidence of damage

There must be proof of legal and/or physical damage which must have occurred as a direct result of a breach of duty in tort or contract which was reasonably foreseeable. If there is no damage, there can be no loss and no claim at law.

One must always ask: what is the actual damage to this building now or in the reasonably foreseeable future? Is the damage directly related to the breach of duty? Is there adequate, sufficient and admissible evidence of the breach and the damage? If there is no actual evidence of damage, will damage occur in the foreseeable future? Could damage be reasonably expected to occur and for what reasons? Is it possible to quantify the damage in financial terms?

Photographic and documentary evidence

Photographic, video and digitally recorded evidence can be the best contemporaneous evidence obtainable.

Some experts may be satisfied with a sample of photographs, while an opponent can always counter with more photographs not restricted to the limits of the sampling exercise. Photographs, video tapes, film and tape recordings are all admissible as evidence, but perhaps the still photograph can give more definition to a particular defect than a moving video picture. On the other hand the moving picture can place the subject in proper context by panning the area.

So far as the rules of court are concerned the expert witness should note that a computer printout, photographs videotape or film are 'documents' for the purposes of the Civil Evidence Act 1995 and that evidence recorded by automatic means is admissible.

Where the computer or calculator makes the calculation, the resulting printout may be classified as real evidence. However, this depends on the person using the computer, the computer programmer or other technical experts who can testify to the function and operation of the computer program.

Section 8 of the Civil Evidence Act 1995 provides that:

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved –

- (a) by the production of that document, or
- (b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

- (2) It is immaterial for this purpose how many removes there are between a copy and the original.

Documents, plans, photographs and models, etc. can be put in evidence before the court without the person who generated them confirming their authenticity, if the other party has had an opportunity to inspect them and agree to their admission without such formal proof. This is covered by rule 33.6 of the Civil Procedure Rules and the end result of the process of notice and inspection is the agreed bundle of documents to be placed before the court and referred to at the trial.

8.7 A checklist of points on evidence

The expert should bear in mind the following points when considering evidence:

- Consider the type of evidence you are producing.
- Have you enough time to gather all the evidence you require?
- Have you made arrangements for inspection and testing? Will such tests and findings be admitted?
- How have you obtained your evidence for your report?
- Have you been advised as to its admissibility?
- If you have collected evidence from others can you rely on it?
- How much time have you spent obtaining it? Is that time/cost proportionate to the merits of the cases? Is it within the client's budget? Will such costs be recoverable in the proceedings?
- Have you been advised that all the evidence referred to in your report is admissible and capable of proof?
- If someone has assisted you in preparing the report does he also have to give evidence?

Chapter 9

Disclosure

9.1 What is 'disclosure'?

As a matter of practicality no dispute can be resolved without the issues being defined and narrowed with the relevant evidence being produced to analyse the issues remaining in dispute. The production of evidence to the other side and in court in written form is known as 'disclosure'. This is governed by Part 31 of the CPR.

This represents a change in terminology. Prior to the introduction of the Civil Procedure Rules the process was governed by Order 24 of the Rules of the Supreme Court and known as 'discovery'. This was a somewhat misleading term since 'fishing expeditions', speculative applications for specific discovery, were discouraged by the courts.

In simple terms disclosure is your client's opportunity to see what evidence is in the possession of the other party to the proceedings. It is a legal process whereby documentary evidence in the power, custody or possession of one party to an action or an arbitration is disclosed to the opposing party or parties to the proceedings. 'Documents' that can be disclosed include recorded material, e.g. tape recordings, video and digitally recorded information. Discovery usually takes place when pleadings are closed pursuant to the directions of the judge or arbitrator as the case may be.

There is no formal process of disclosure in statutory adjudication but the parties will disclose relevant information to put their case in the bundle of documents that are referred to the adjudicator.

Standard and specific disclosure

Standard disclosure entails the disclosure of documents on which a party relies in accordance with rule 31.6. These are documents which adversely affect his own case, adversely affect another party's case, support another party's case, and documents a party is required to disclose by a reason of a relevant practice direction.

Disclosure is effected by categorising and listing all relevant documents, etc. on a standard form and effecting mutual exchange of these lists. Once they have received the list from their opponents the client's legal team will ask for photocopies of the documents they have not seen or else facilities to inspect them.

The court may also order disclosure of specific documents. The parties are

under a duty to search for these if so required. Ease and expense of retrieval are among the factors the court will consider. Whilst these rules may seem more flexible than the previous regime, the element of costs is clearly a limiting factor. An objection can be made that the party does not have a right to inspect because the opposing party considers that it would be disproportionate to the issues in the case to permit inspection of documents even within the category or class of documents disclosed under standard disclosure.

Pre-action disclosure

The Civil Procedure Rules provide a process of disclosure before action as well as an exchange of information under the appropriate pre-action Protocol (rule 36.16). Applications for pre-action disclosure may be rare and the courts will not allow 'fishing expeditions'. There must be a reasonable and worthwhile claim or a reasonable basis for an intended claim. The court will only make an order for such disclosure in order to:

- dispose fairly of the anticipated proceedings;
- assist the resolution of the dispute without proceedings;
- save costs.

Importance of disclosure

Under the rules of court it must be emphasised that disclosure of documents is the job of the solicitor; it is not the job of the experts alone. There are cases however where, as a matter of practicality, a solicitor may ask the expert to assist with the process.

Discovery is usually undertaken by the client's solicitor visiting the opposing party's solicitor, or perhaps the offices of the opposing party, to look through the documentation available, to make any notes and to arrange for any photocopies he may wish to obtain. It is very useful if the expert witness can be involved at this early stage, as apart from the maxim that 'two heads are better than one', the expert may well identify items of information in some of the documents which may have a particular technical significance. He is of course likely to be more familiar with documents such as construction drawings, bills of quantities or the quantity surveyor's dimension sheets.

Indirectly the expert will always be affected by disclosure and interested to assess the technical importance of documents in the other side's possession. These documents may be vital insofar as they may affect his analysis of the facts and his opinion on them.

Disclosure comes before the service of any Scott Schedule (see Chapter 10). There may be many documents that have a direct bearing on the replies required for the Schedule and hence the necessity of the expert seeing such

relevant evidence that may affect technical replies and subsequently the facts and the opinions of his final report. If additional documents are disclosed then the expert must examine these carefully if relevant to the issues he has to deal with.

Once the expert has satisfied himself as to the principles involved in the dispute and arrived at his own conclusions, there is normally an opportunity to confer with the instructing solicitor and barrister. By this time he may have been asked to produce a preliminary advice which will form the basis of such discussion. In doing so the expert needs to be very much aware of the implications of the changes in the rules relating to privilege considered below.

9.2 *Assisting with disclosure*

Whether the expert is advising in a civil court action or an arbitration matter, the orders and directions given for disclosure have a similar effect and meaning. In a building dispute this can mean a substantial amount of pre-contract, contract and post-contract documentation emanating from the architect, the employer, developer, contractor and subcontractors, engineer, project manager, management contractor, works contractors, quantity surveyor, valuer, solicitors and other consultants. All the relevant documentation originating from them is disclosable unless it is privileged from production. It must be emphasised that disclosure is principally the task of the solicitor and the expert can only assist with it if expressly instructed to do so. The extent of the expert's involvement must be clearly defined by the solicitor in each case.

In heavy cases the documents disclosed can be so numerous that the cost of both solicitors and experts may be justified on the basis of the manpower required, but also because the expert will be able to identify technically complex matters that the solicitor might not readily understand. In any event the relevant officer of a corporate client should be available to identify and locate key documents. The input of experts and the client at the inspection stage may actually accelerate the process and curtail costs.

In the larger cases, therefore, the work will be undertaken by various people and much sifting of evidence will involve paralegal personnel as well as clients. The expert may assist with the process where it is essential and necessary.

If he is to assist with disclosure the expert must know his own side's strengths and weaknesses and decide what evidence he needs to obtain or should be looking for in the other side's documentation. He will want to discover and investigate the documentation not only for trial purposes but also for the purpose of obtaining evidence of facts which he may be able to agree or not and/or evidence of facts which may counter the other side's expert's conclusion.

The solicitors will have examined the other side's documentation to ascertain what evidence supports their client's case and what evidence is

against it. The expert should be able to assess the technical importance of any contradictory evidence and deal with it in his report.

It is important that the expert deal with all the facts and not simply those that support his client's case. If contradictory and conflicting facts appear from the documents then the expert must try and resolve those on the basis of what is most likely in his opinion. If he cannot reconcile facts he must say so. The expert must not forget his overriding duty is to the court as an expert witness, whilst his professional duty is to his client. If that causes conflict then the expert may have to consider seeking the court's directions if appropriate.

In all these tasks the expert must keep in mind the need to keep the costs proportionate to the work in hand. Solicitors invariably will want to ensure that experts do not let costs get out of control and it is equally important that solicitors do not unnecessarily delegate too much to experts. What counsel may require in the course of a conference must be translated into commercial essentials.

The following suggestions are made as to the expert's likely role in disclosure subject to express instructions from the legal team.

- (1) He may request a detailed brief for discovery from the solicitors, to give clear indication of the type of technical issues they require him to examine. That may either be a general or particular and detailed brief depending on the type of case.
- (2) He should obtain a copy of the relevant pleadings, e.g. particulars of claim and defence.
- (3) He might attend with the solicitor at disclosure, if so required, and obtain copies of any document through the solicitor that may be relevant to the issues of the evidence upon which the expert or his opponent may seek to rely for proving his report and conclusions, i.e. any material likely to give assistance to either side's experts.
- (4) He should review such evidence to see whether there is a basis either for agreeing facts with the other side's experts or possibly producing a joint report to save costs.

9.3 *Privilege*

Evidence disclosed should not be 'privileged' or of such nature as it would be unconscionable to disclose for reasons of public policy.

What is non-disclosable evidence

Privilege is a very difficult legal subject and this book can only give the expert the merest indication of the types of evidence that may by their nature be privileged. In each particular case where a question of disclosure and admissibility of evidence may arise, it is a matter for the lawyers to advise the expert and the client.

'Privilege' is the legal term that applies to non-disclosable evidence, for example communications between solicitor and client, 'without prejudice' correspondence (that is, correspondence which genuinely attempts to settle or agree issues in dispute) and notes of any such conversations and meetings, advices and opinions of counsel, and expert advice and opinion given strictly for the purposes of considering, or in contemplation of, proceedings.

The new openness

Privilege used to extend to witnesses' written statements (or proofs of evidence as they were called) unless privilege was mutually waived. However the Official Referees (now the TCC judges) found advantage in such disclosure in cutting court time on examination-in-chief. It was probably their experience and that of their colleagues in the Commercial Court that convinced those reviewing civil procedure to adopt such practices across the whole civil justice system. It is now standard for witness statements to be exchanged between the parties.

Advice or report

Doubts have been raised as to whether under the new CPR the instructions to an expert are privileged or not. The better view expressed by Sir Louis Blom-Cooper in his *Draft Code of Guidance for Expert Witnesses* appears to be that the instructions to an expert to prepare a report by way of advice are privileged but on the other hand a report prepared after proceedings have been issued for the purposes of the proceedings is not so privileged. (See Appendix VI.) It further appears that if the same expert prepares such a litigation report this waives the privilege of previous instructions and the legal privilege that attaches to the preliminary report. If the report is disclosed all instructions must also be disclosed.

Paragraph 1 contains the reminder:

Experts who are instructed by solicitors on behalf of their client to provide advice owe a duty to the client; in the event that the matter proceeds to litigation the expert's overriding duty is to the court.

Expert witnesses often have difficulty with questions of privilege. It may be that with the recent rule changes there is added difficulty, but there need not be. What the expert should consider is the purpose of his advice. If such advice is given to a client for the purpose of considering the merits of any legal action and is obtained at the request of the solicitors acting in contemplation of litigation, then that advice may be privileged and would not have to be disclosed. If it is prepared for purposes of an expert's report and is the subject of the instructions then it may be disclosable.

The expert must therefore distinguish between:

- the advice; and
- the report.

Advice covers things said and done (including any draft report before rule 35 takes effect). Such advice given in order to determine technical/legal merits is privileged from production if obtained at the request of solicitors in the ordinary course of events. If, however, the expert prepares a final report for use in litigation then such report is disclosable. All material instructions must be disclosed, whereas formerly the expert may have considered these to be privileged as communications with the client's legal advisers.

The expert should note very carefully that such privilege as may initially exist for the purposes of the preliminary advice may cease if the reporting expert continues to advise. His pre-litigation advice then becomes disclosable.

The expert must therefore carefully consider whether he is giving initial advice which may be the subject of subsequent disclosure to the court and, indeed, be taken into account in terms of costs orders and conduct of the parties under Part 44. The expert should therefore note the rules relating to privilege and his report contained in Part 35 (see Appendix V) and Practice Direction 35 supplementing it.

The rules regarding privilege

Rule 35.10(4) categorically states that the material instructions on the basis of which the report is written:

... shall not be privileged against disclosure but the court will not, in relation to those instructions –

- a. order disclosure of any specific document; or
- b. permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions [included in the report] to be inaccurate or incomplete.

However the effect of this is qualified slightly in that Practice Direction 35 at paragraph 3 limits cross-examination on those instructions:

The instructions [summarised in the report] will not be protected by privilege (see rule 35.10(4)). But cross-examination of the expert on the contents of his instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents to it). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will

allow the cross-examination where it appears to be in the interests of justice to do so.

Hence the former privilege enjoyed by the expert has been slightly eroded insofar as he must disclose in his report the material instructions upon which his report is based. (rule 35.10(3) of the CPR). The expert should therefore be aware that the opposing party may ask for disclosure of his instructions and related documents and that he could be cross-examined on them, but only in relation to a report prepared for use of the court. An erosion of privilege to the extent that the expert was required to disclose matters pertaining to the preliminary advisory report might be seen as a step too far against the common law rules relating to professional privilege.

Mention may be made of some cases in point.

In *Clough v. Tameside and Glossop Health Authority* (1998) Mr Justice Bracewell held that the court should order disclosure of the expert report because the evidence of an expert is admissible on any relevant matter upon which he is entitled to give evidence. The expert is under a duty to give independent evidence and to state to the court the basis for his opinion on the facts including any facts or evidence that may weigh against that opinion. So if an expert wrote a side letter explaining his reports it may be that such a letter would not be privileged, but regarded as an extension to the report, as indeed would any answers to any questions put by the expert's opponents for written answer under rule 35.6 (3) of the CPR.

In *Kenning v. Eve Construction* (1989) the plaintiff received a copy of an expert's letter to the defendants' solicitors disclosed by mistake. The court held that the points made were obvious so that the plaintiff might have pleaded the matters and amended in any event. The plaintiff was granted leave to amend. The defendants had the choice of protecting 'privilege' attached to the statement by not calling the expert, or calling him and subjecting him to cross-examination. If the point was an obvious one it is hard to see how such an expert would avoid cross-examination on it in any event.

The Court of Appeal in *Derby & Co. and Others v. Weldon and Others* (No. 9) (1990) held that the court had no power to order a party to disclose expert evidence on an issue on which that party did not intend adduce evidence.

It seems from these somewhat conflicting decisions that if the matter is obvious nothing can really prevent the expert being examined on the matter. If the expert writes a side letter that is elicited on the defendant's request it must be disclosed under rule 35.6(3). It is suggested that if the expert adduces further evidence by way of a side letter explaining a report that is exchanged, that also must be disclosed. Correspondence to clarify the solicitor's instructions may also be the subject of disclosure where, for example, the court considers the substance of such instructions is inaccurate or incomplete, paragraph 3 of Practice Direction 35.3.

Concern as to loss of privilege

There has been concern that the new rules are eroding the former privilege recognised at common law and under the former Rules of the Supreme Court. It is suggested that no privilege would now attach to communications between legal advisers and experts in the course of litigation.

The answer to this question must await judicial consideration. It may be that the courts will not upset the balance too much. The court will not want to order such disclosure unless it is satisfied that there are reasonable grounds to consider the statement of instructions inaccurate or incomplete (rule 35.10 (4)).

Phipson on Evidence raises two questions:

- whether solicitors should include instructions to experts in the non-privileged section of the list of documents, save for reasons of rule 35.10(4); and
- if the other party obtains such instructions can they form the basis of any cross-examination of the expert?

It is suggested in *Phipson on Evidence* that the party concerned could apply for an injunction to restrain a breach of confidence on general equitable principles. However, in the light of the overriding objective, a court nowadays might have difficulty. This is because if the evidence is relevant and admissible and clearly facilitates the principles of the overriding objective and proportionality the court may feel obliged to admit such evidence.

In *English and American Insurance Co v. Herbert Smith* (1987) solicitors inadvertently received their opponent's instructions to counsel. They returned them after having read them and informed their client. The court granted an injunction restraining the use of the information obtained. This case was followed by *Ablitt v. Mills & Reeve* (1995) where Mr. Justice Blackburne granted an injunction restraining solicitors who had read certain documents on client's instructions from acting further. These cases, however, pre-date the new rules.

The answer to the concerns raised is further complicated following the introduction of the Human Rights legislation and whether or not the application of the rules may be *ultra vires*. The real test of this will lie in the analysis of the conflict between procedural rights and rules and substantive legal rights, determined on the facts of each particular case. However there is an analogy in Mr Justice Toulson's judgment in *General Mediterranean Holdings v. Patel*, a case concerning a power to override privilege in matters concerning costs orders. The court held that, insofar as the new rules sought to abrogate a person's right to legal confidentiality, they were *ultra vires*. This was because the power to modify the rules of evidence was incidental to the introduction of the new procedural rules whereas legal professional privilege was an attribute or manifestation of substantive law.

A further concern is the disclosure of collateral documents which are privileged. It has been suggested that the courts may be reluctant to permit

the latitude given in respect of collateral documents referred to in the statement of case or witness statement. These are matters that experts will need to be particularly careful about and upon which legal advice must be sought.

In the case of expert's instructions it would seem that there is an area for further review.

9.4 Cost considerations

The court's approach

It is difficult to lay down any hard and fast guidelines for experts in relation to their involvement in disclosure. Disclosure is the work of solicitors. It may be useful in some cases for solicitors to be assisted by experts, but costs should be considered.

The rules demonstrate the need for a pragmatic approach to costs and resources. The court is now directly concerned with costs. Furthering the overriding objective, dealing with cases justly, entails saving expense and ensuring that the case is dealt with expeditiously and fairly.

The court will consider the conduct of the parties before and during litigation, i.e. whether claims are reasonable to pursue, the manner in which they are pursued, and whether a claim has been exaggerated. The rules do not expressly refer to fees of experts being reasonable or proportionate, but they seem to imply the requirement that:

- Experts should carry out their instructions observing the overriding objective and their duty to the court.
- Their conduct should be reasonable and avoid unnecessary work, duplication or exaggerated claims for fees.
- Their work and charges should be geared to the value of the claim, so that in the context of the claim their fees are neither disproportionate to value nor unreasonable.

In instructing experts solicitors must always bear in mind the question of costs and proportionality, and whether the court would allow such costs on assessment.

Illustrative cases

Although the following cases are quite old (indeed one is from the beginning of the 20th century), they are of interest in showing how the courts view the costs incidental to the expert's involvement in a case.

In *James Longley v. South West Thames Regional Health Authority* (1983) it was held that such costs of expert assistance (not necessarily related to discovery) would be allowed on the basis that such evidence was necessary to form an informed judgment.

In *Reynolds v. Maston* (1986) Mr Justice Bingham considered the general practice of expert witnesses who had been warned to attend a hearing but in the event were not called to give evidence and consequently did not receive any cancellation fee for the time set aside and not used. However, in the special circumstances of the case before him the experts were entitled to receive compensation for time set aside where the case had been settled on the day before the date fixed for trial.

It is not usual to allow the expenses of experts who are called not as witnesses but merely attend court to advise counsel (*Consolidated Pneumatic Tool Co. v. Ingersoll Sergeant Drill Co.* (1908)).

9.5 Practicalities

Protecting evidence

If there is any danger that documentary evidence may be destroyed, then the client's legal advisers may consider invoking a court's jurisdiction to seize and preserve the evidence by means of an 'Anton Piller order' (*Anton Piller KG v. Manufacturing Processes Ltd* (1976)). This is usually exercised in cases involving films, tapes and records, but orders can be made to protect documentation where there is a risk of its removal or destruction (*Emmanuel v. Emmanuel* (1982)). The importance of the evidence and the risk are factors that must be considered before this exceptional measure is taken.

Preservation of evidence may be secured by the court granting an order. The Civil Procedure Rules provide that the court can order the detention, custody or preservation of any property which is the subject of the cause of matter or as to which any question may arise (rule 25.1(1)). The court can also order inspection of such property, or under rule 25.1(3)(c)(iii) replacing the former Order 29 rule 3, order samples of the subject matter to be taken or order experiments to be tried on or with such property.

Early inspection

The expert should inspect the property in order to satisfy himself as to the nature of the defects and the extent of damage caused to property. In certain, rare circumstances early inspection of property may be ordered by the court but it is usually the case that inspection can be agreed simply through respective solicitors. If there is any danger of evidence being destroyed, then naturally the expert will want to take the earliest opportunity of inspecting the property to see the actual state of the defects before any urgent remedial works are carried out.

It may be a good idea for the expert to suggest to his client's solicitors that the judge or arbitrator inspect the site prior to, or during, the course of the remedial works.

If before disclosure there is anything the expert is not sure of relating to

matters in issue or evidence, he must clarify these with the legal team. He must fully appreciate what needs to be proved as a matter of fact and what needs to be proved by way of his opinion evidence. For ease of reference and guidance, the expert will need to refer to the points of claim or statement of claim, the subsequent pleadings such as defence and counterclaim, but more particularly he may be assisted by the Scott Schedule which will provide a brief synopsis of the issues in dispute.

Negotiating issues

If a number of documents are disclosed that the expert considers highly relevant to his client's case and his view on the matter and these undermine the whole or part of the other side's case, then the solicitors advising the client should discuss the importance of such a matter both with the expert and with counsel and decide whether or not the matter can be raised forthwith as an issue and in the negotiations. This will involve the expert in giving his view and support in the negotiations. The expert must judge the weight and strength of the point from a technical standpoint; if he feels it is valid and of significance then the matter must be pressed as hard as possible in the negotiations.

Failure to act reasonably in this regard would involve the parties in unnecessary expense and, with the wide discretion the courts now have, could be penalised in costs. As stated in Chapter 1, it is not good practice for a party to 'ambush' their opponent at trial.

Quantum element in evidence

'Quantum' is another term for monetary value. In searching the other side's documentation the expert must not only look out for evidence that establishes liability, whether in tort or in contract, but must also look at evidence relating to the quantum element of his client's claim. It is essential to prove that the client has suffered loss as a direct result of a breach of contract or tort by way of physical damage or economic loss. This can be based on the real evidence which the expert may possibly have examined, defects on site, documentary evidence in possession of both parties, oral evidence to be given at the hearing, but more particularly the expert's opinion based on that evidence.

It may well be that the expert has been furnished with some statements obtained from witnesses by the solicitors, and these can then be compared with the evidence obtained in the process of disclosure. When disclosure is completed, the expert and his client should have a much better and more precise estimate of exactly what quantum of damage is involved and a clear idea of where the responsibility and technical liability lie.

Before the hearing

Again, the expert will need to decide from a technical point of view, for the purpose of writing his report for exchange and preparing for examination in court, what evidence supports his client's case and the basis on which he, the expert, is supporting it, what evidence is relevant to the issues and what is the best evidence. Unless this exercise is carefully carried out, he will not cover all the issues that counsel may require him to deal with for the purposes of the final report. This will basically form the substance of the expert's own oral direct evidence at the trial or hearing.

It is essential that evidence exchanged on disclosure should be considered by the expert who may give evidence. He must see what the other side has, because he himself may be called on to give his view on that evidence as well as the evidence put forward by the other side's experts. It is no use delegating this work to an office junior: time and time again disclosure may reveal some unexpected finds. These may be quite useful in supporting the client's case or undermining that of the other side.

Solicitors must examine the other side's documents. That is their duty to the court as officers of the court but the expert also has a duty to review the technical evidence in giving his report and examining evidence obtained from disclosure. He may well seek to rely upon such evidence in presenting his report and giving evidence orally.

Solicitors are sometimes not content merely to rely upon photocopy documentation as a substitute for inspection, albeit that the process of an inspection is a somewhat ancient process. Original documents may be required and certainly solicitors examine those very carefully, especially where such originals refer to documents that are unavailable or unobtainable. The solicitors may not be satisfied that disclosure is complete and they may issue an application for specific disclosure under rule 31.12 of the CPR.

Useful hints

In complex technical cases the expert may attend with the solicitor as suggested. If so he should be responsible for making his own notes as to what documents he may require for the purposes of reference and what copies he may require for inclusion in his report. In reading through the evidence disclosed the expert may consider a number of points that have not been previously addressed, and the evidence may also raise further technical questions that he will wish to address. The expert may also seek to make further enquiry or investigation. Disclosure is a process that may last several days depending on the volume of documentation. It is essential that if the expert does attend to inspect he keeps within the bounds of relevance and that, although he may be intensely interested in a particular technical aspect or subject, he must always have an eye upon the particular issue in the proceedings and the reason why he is being called to give evidence.

So far as technicalities and scientific proof are concerned, counsel will rely

upon the expert's view of the matter. Whether such evidence he may give will be admissible will be a matter for the judge but at this stage the expert must concern himself with relevance to the issues as pleaded. The context in which the expert refers to disclosed evidence will be a matter for the expert to consider in the context of his report and the technical subject addressed.

Completing disclosure

Once disclosure has been completed either by the solicitors or with the assistance of the expert, the expert will want to consider very carefully whether or not his opinion has changed in the light of new evidence. If his opinion has changed he must say so and if necessary write an appropriate letter or report to the solicitors. They will then consider whether or not that necessitates changing any particular pleading or allegation, or indeed whether further investigation must be made to the case. By the end of disclosure the expert should be able to give reasoned and objective opinion to this client and solicitors as to whether, upon the basis of the technical evidence, the case appears sufficient or not. If not, he must be frank.

Apart from the documentation a clear indication of the client's real position may come from witness statements that have been obtained by the client's solicitors. When these are exchanged between the respective parties' solicitors, experts will review those statements in the context of the evidence disclosed.

9.6 Conclusion

Summary of the purpose of disclosure for the expert

So far as the expert is concerned, disclosure is a critical stage of the legal proceedings. His aim in assisting with this process should be:

- (1) To obtain evidence, to substantiate and corroborate his views and generally support his client's technical and legal case.
- (2) To assess the strengths and weaknesses of his client's case and the opposition's case and to reassess it in the light of disclosed evidence. (This may result in amendments to pleadings and in the joining of other parties in the action.)
- (3) To clarify uncertainties and narrow the issues in dispute.
- (4) To assist in negotiations and agreeing matters of fact in order to save costs and court time, using the evidence to the best possible advantage of the client.
- (5) To obtain further evidence for final report.
- (6) To ensure that he has seen all the relevant evidence relating to the issues in the case before giving evidence at a hearing.
- (7) To assist generally the legal team with technical opinion on matters of fact.

- (8) To assist the court or arbitrator in giving evidence in an honest, clear, professional and concise manner.

Disclosure and evidence checklist

In dealing with evidence obtained on disclosure and in evaluating such evidence an expert should bear in mind the following matters.

- (1) What are the issues in the case?
- (2) Have pleadings been placed at your disposal and have you had the benefit of understanding all the points in issue and have these been explained?
- (3) What is your client required to prove on each issue?
- (4) What evidence do you rely on for your opinion?
- (5) What evidence supports your client's case?
- (6) What evidence is against your client?
- (7) How do you assess and evaluate this evidence?
- (8) Are you able to agree any evidence/conclusions with your opponent? Have you authority to do so, from the client and from the solicitor?
- (9) Has disclosure brought the parties closer together or put them wider apart?
- (10) Have you properly evaluated the evidence obtained from the other side on disclosure?
- (11) Have you any doubts about your opinion on any issue upon disclosure and exchange of witness statements? If you have such doubts, have you told solicitors and counsel? Are they fully aware of any such doubts? Have you reflected this in your report?
- (12) Are you confident that you can support your opinion/opinions in your report on the basis of all the evidence you have seen and investigated?

Chapter 10

Preparation of Scott Schedules

One of the distinguishing features of the Technology and Construction Court practice is the use of Scott Schedules to present the issues in dispute for determination and judgment. It was sometimes referred to as an 'Official Referee Schedule' but it is usually described after its inventor. Those interested in the history of this form of pleading in the Official Referee's court are referred to the work by Judge Edgar Fay, *Official Referee's Business*, and to a similar work, on the practice of the court, by Judge John Newey.

10.1 Objective

The object of such a schedule is to save time and costs by dispensing with the constant reference to volumes of pleadings.

It has the advantage over pleadings: firstly, because it is in a tabular form that can be technically understood at a glance; and secondly, because it does away with the constant cross-referencing of pleadings and further and better particulars. All the claims and allegations, counterclaims and basis for such should be within the confines of the schedule.

The schedule has also been adopted by arbitrators and they may give directions for the production of such as a matter of practice.

Case management requirements

The type and form of the schedule will vary according to the particular case. At an early stage in any case there is a Case Management Conference (what used to be known as a Summons for Directions). The parties meet before the judge who makes an order setting out a timetable for various procedural requirements leading up to trial (e.g. pleadings, disclosure and exchange of experts' reports). The *pro forma* for such an order in the Technology and Construction Court is set out in Appendix 2 to Practice Direction 45C of the CPR and, so far as the preparation of the Scott Schedule is concerned, the judge will give specific directions as to the column headings or accept those as drafted and agreed between the respective parties and their counsel.

Compliance with such directions must be confirmed when the parties complete the Pre-trial Review Questionnaire. If necessary the Court may issue further Pre-trial Review Directions as to format or compliance.

10.2 *What type of schedule?*

The type of schedule depends on the nature of the case. If it is a defects case, it will usually take the form of a schedule of defects and damages. Sometimes counsel may require that this is drafted in a particular form to suit the particular case, e.g. where particular details of defects are required for each room of every house in a particular block on a estate.

In the main, counsel will require a detailed schedule based on the pleadings he has drafted and a statement of the case as it stands, i.e. omitting any items previously agreed. The items in the schedule should be clearly cross-referenced so that neither the judge nor counsel wastes time in conference or in court ascertaining exactly what is alleged or refuted. Alternatively, counsel may draft the schedule with the assistance of solicitors and the expert.

The sample schedule on the following pages for a building defects case is suggested as a mere guide. The expert witness will usually assist counsel in deciding the best and most appropriate form depending on the type and complexity of the case.

The item and description of defects

The item number should refer to each item in order of sequence in the schedule. The description of defects should start with a reference to the allegation in the particulars of claim and give a precise description of the defect.

It should state, for example:

The DPC in the area of the [...] to [...] was omitted contrary to the specifications [item ...] and in breach of the Building Regulations [regulation ...] all contrary to [para ... of the code of practice 19 ...]. The contractor omitted this and by so doing was in breach of Clause [...] of the contract dated [...]. The architect failed to insure that the DPC was laid in this area and failed to make an adequate inspection or supervise in accordance with Clause [...] of his contract.

This type of drafting will encompass alleged breaches of contract against the contractor, breaches of the Building Regulations, and hence statutory duty, breach of contract by the architect and breach of his duty of care in negligence. The party alleging must be precise and specific in the wording of the schedule. Although this is not the duty of the expert, it will assist counsel if the expert appreciates the arguments that can turn on the precise wording of a description of a particular defect. If the schedule says 'widespread on all roofs', it is better that each defect is described on summary sheets and identified by a map appended to the schedule, cross-referenced to photographic/video evidence as may be necessary.

Sample Page from Scott Schedule

Property/type	Defect element, report reference, Sharp & Co.'s report	Defect	Breach Alleged	Breach of codified terms*	Relevant regulations byelaws, codes of practice	Remedial work done since appointment of Sharp & Co. (respondents) - A1 Nos 242, 286, 248	Cost (£)
(1)	(2)	(3)	(4)	(4a)	(5)	(6)	(7)
1 Windsor Court, 5 River Court	Roof D.1	Faults allowing water penetration or creating a risk thereof and faulty insulation.					
	D.1.1.2, D.1.2.1, D.1.2.2, D.1.3.1, D.1.4.1, D.4.2, D.1.6.1	(1) Missing and inadequate pointing to the stepped flashings at the junction of link bedrooms with the gable end and inadequate wedging to the said flashings.	(1) Negligent supervision	(1) AC	(1) Byelaw 50	(1) Removed stepped flashings and insert new flashings in conjunction with new cavity trays (D.1.6.1).	1,728.20
	D.1..1.2, D.1.2.1, D.1.3.1, D.1.4.1, D.1.6.1	(2) No cavity trays provided at the junction of link bedrooms and gable ends.	(2) Negligent design	(2) BC	(2) Byelaw 50, Building Research Digest No. 11, Oct. 1959	(2) Instal cavity trays (D.1.6.1)	
	D.1.4.1, D.1.6.1	(3) Missing and incomplete pointing to stepped flashings at junctions with adjacent dwellings and inadequate wedging to the said flashings.	(3) Negligence supervision	(3) AC	(3) Byelaw 50	(3) Flashings repaired, rewedged and repointed (D.1.6.1).	
	D.1.6.1, D.1.6.3	(4) Ceiling insulation to link bedrooms laid untidily and incompletely.	(4) Negligent supervision	(4) A		(4) Provide new insulation to link bedroom ceilings to current standards (D.1.6.3).	

* Breach of Codified Terms: The following code is used hereunder:

A - Breach by respondents of obligation to provide dwellings which were constructed in a good and workmanlike manner.

B - Breach by respondents of obligation to provide dwellings which were constructed of materials which were of good quality and reasonably fit for their purpose.

C - Breach by respondents of obligations to provide dwellings constructed so as to be fit for human habitation.

Note: Where more than one letter appears against a defect and no preposition is used, the words 'and/or' should be read in between each letter.

Remedial work carried out at claimant's expense before appointment of Sharpe & Co.	Cost (£)	Consequential losses	Amount (if any) admitted by respondents (£)	Respondents' observations	Claimants' reply	Respondents' observations on the allegations in columns 4a and 13
(8)	(9)	(10)	(11)	(12)	(13)	(13a)
		Payments to date to tenants rehoused while remedial work was being carried out:		Roof D.1	1 Windsor Court, 5 River Court	1 Windsor Court, 5 River Court
		5 Windsor Court Removal expenses	300.00	The respondents deny that the conditions alleged occurred in each dwelling and/or any condition so found results from negligence on their part and/or that any condition so found has resulted in damage to the structure.	<i>Note:</i> Save as hereinafter appears and safe insofar as the same consists of admissions, the claimants join issue with the respondents on Column 12.	Roof D.1 (1) Breach of Codified Terms A and/or C denied.
		Loss of rent while remedial work was carried out:	11,107.10 3,957.07	Negligence design and/or negligent supervision is denied for the following reasons:	Roof D.1 (1) - (2) - (3) - (4) - (5) -	(2) Breach of Codified Terms B and/or C denied. (3) Breach of Codified Terms A and/or C denied.
		1 Windsor Court 5 River Court		(1) and (3): That the alleged faults arose as a result of failure to carry out appropriate maintenance. (2): No damage arises.		(4) Breach of Codified Term A denied.
		Detailed calculations of such rent losses will be submitted within 21 days of service of the schedule.		In response to items (1), (2) and (3) at Column 3 and item (5) at Column 6 the respondents deny the necessity of the works carried out		

The damages claim

The damages that can be claimed under a building contract are measured by the cost required to rectify defective work to bring the building up to the standard that was contracted for, i.e. the state in which the building would have been had the contract been performed properly in accordance with its provisions. In certain cases it will not be appropriate to claim damages because the cost of remedial works would outweigh the likelihood of recovery of such cost from the other party. In such a case the claimant may claim that he has suffered a 'diminution in value' which is assessed by a valuer as a certain percentage of the current market value of the property at the date of the hearing.

The defendant's comments

The defendant here refers to the particular paragraph of his defence which deals with the item of claim. He may make a straightforward denial by passing responsibility for the defect to, say, the architect. If a contractor, he might say that he obeyed the architect's specific instruction on the matter and omitted a certain detail. The architect, in his turn, may deny and defend by saying that he redesigned the detail after his client protested it was an extravagant waste of money and he could not afford it. On the other hand a contractor may admit he built a certain particular detail badly but may dispute the cost of reinstatement, in which case he will admit the claim but argue that the value of reinstatement is less than the claim.

Judge's comments

A column is left for the use of the trial judge or arbitrator.

10.3 *The expert's role***Drafting the schedule**

In some cases the expert witness will draft a Scott Schedule for the approval of the legal team having discussed format with the client's solicitors in the light of the judge's directions. This happens in cases where the expert has had some experience of the type of case before and has given evidence in court on previous occasions. The expert who is acting as expert witness for the first time can assist counsel by putting forward draft schedules but would do better to be guided by what counsel and solicitors advise.

There is no general rule about drafting the schedule. Some judges will require very full description and detail, while others may require only a very concise statement. The court's approval of format should be obtained with comments from the other parties who may agree format in advance subject to any directions of the court.

The schedule may be used by counsel to conduct the hearing and may be used to discuss aspects of the case during 'without prejudice' negotiations. The advantage of a Scott Schedule is that it states the issues and consequently assists in narrowing the differences for the purpose of such negotiation.

On considering the draft schedule the expert and lawyers may consider some items insignificant – the pursuit of such items could result in throwing away the costs, or costs spent on pursuing a relatively small item could exceed the damages recovered. Some items in the schedule may be agreed as defects subject to the determination of the issues of liability and quantum.

Practicalities

If the expert is asked to submit a draft to counsel he should base the schedule on the form prescribed in the judge's directions and the advice of counsel as to headings. He will base it on the particulars of claim if acting for the claimant and any reply to the defence and counterclaim. Further and better particulars (if any) should also be reviewed to see whether any additional allegations emerge. Having compiled the list of allegations, the expert should refer to his report to see what the allegation is based on and state it concisely. He should state the cost with support, where necessary, from a quantity surveyor and/or valuer.

Counsel will check the draft and revise the wording appropriately. The expert may cross-reference the pleadings to his report. In the report he will refer to codes of practice, Agrément Certificates, trade association codes and to the Building Regulations, depending on which regulations or codes were in force at the time when the damage occurred. Once the claimant's case has been completed, the schedule is served on each defendant and their comments are entered. When each party has completed it and served it, the schedule is regarded as a summary of the pleadings and used accordingly by counsel at the hearing.

Apart from the formal Scott Schedule in major building defect cases, other schedules may be of considerable assistance to the court to illustrate clearly where, for example, a contractor has been in delay or where an architect has been late in issuing instructions. Such schedules can also be of value in loss and expense claims and in arbitration generally.

The great advantage of scheduling is that issues are clearly analysed. There is no wastage of words. The expert should make use of his natural and professional skills, be he architect, quantity surveyor or building surveyor, to illustrate his opinion and views by sketches, drawings, graphical displays and schedules.

10.4 Information technology (IT)

The use of computers (word processing tables and spreadsheet packages) is something that is ideally suited to the production of Scott Schedules. Rather

than struggling with sheets of A3 paper pasted together and hand-written comments cramped into boxes too small for them, rows and (with the approval of the court) columns can be added at will and the cell size expands to take what is written into it. The schedule can be printed out landscape in a tiny font and enlarged to A3 on a photocopier to make it legible. Instead of an increasingly shabby paper version being passed from party to party to incorporate their comments in the relevant column, a master disk is handed round and hard copies of the schedule can be run off at any stage.

On the other hand some control over the process has to be established from the outset. The judge can give directions but well before that stage the parties should have discussed the issue to ensure their systems are compatible and all are in agreement on the format to be used. The Technology and Construction Court Solicitors Association have a published Protocol to facilitate this:

The purpose of the TeCSA IT Protocol is to facilitate and encourage the exchange of information amongst users of the Technology and Construction Courts through the use of information technology.

...

The purpose of the Protocol is not to lay down strict rules, but rather to indicate to users of the Protocol the likely areas of agreement they will want to come to.

The expert and counsel should be wary of over-sophistication, but overall the sensible use of IT facilities, increasing clarity and ease of use for what can be extremely long and complex schedules, can only assist in achieving the CPR's overriding objectives of justice and proportionality.

10.5 Checklist for preparing a Scott Schedule

- (1) What has the court directed?
- (2) What has been agreed under the TeCSA IT Protocol?
- (3) Who is to draft the schedule?
- (4) What matters have to be covered in the schedule?
- (5) What are the headings of the schedule?
- (6) How much detail is required for each item in the schedule?
- (7) What other schedules may be appended to the Scott Schedule for further detail and description purposes?
- (8) Are there any other schedules or devices by which the case could be presented clearly in an effort to save costs and time?

Taking a lesson in cost saving from Judge Scott the parties should try to be inventive to suggest ways and means to the court by which time and cost can be saved. The experts may be actively encouraged to assist the court in this respect.

Chapter 11

The Final Report and Trial

11.1 Status of the final report

Once the pleadings are closed, the Scott Schedule drafted and served, and disclosure completed, the expert should concentrate all his efforts on preparing his final report. This report will comprise the basis for his oral evidence in court. It will also be the basis for final negotiations and the subject of a response by the other side's expert after exchange. The basic objective is that the expert should state the facts and findings of his investigations and give his opinion and conclusions on such facts.

Prime objective

The aims of the rules of court in this context are to encourage settlement and agreement on as many issues of fact as possible. Accordingly the rules of court provide for expert discussions before and after disclosure and exchange by the parties of their respective experts' reports, and gear the process to narrowing the areas of difference between the parties (see also Chapter 7).

Other objectives

The rules relating to exchange are also aimed at:

- (1) avoiding surprises at trial and avoiding lengthy argument on matters of fact;
- (2) obviating the need for experts' attendance at trial where matters can be agreed, so shortening the evidence and consequently the costs of the case.;
- (3) enabling the respective experts to prepare their arguments more carefully and thoroughly.

Overriding these objectives, the court aims to ensure that equal opportunity is given to presenting a case adequately. The rules seek to prevent a party from obtaining another party's report without having disclosed his own. They also ensure that both sides have equal opportunity to call their own expert or experts.

There is the ultimate sanction of non-compliance with an order to disclose in that by rule 35.13 the court may exclude the evidence. Co-operation between experts is essential otherwise there are bound to be cost penalties.

Restrictions

As referred to in Chapter 1, Lord Woolf in his Final Report identified the proliferation of expert evidence as one of the main contributory factors to the heavy costs of litigation. Part 35 of the CPR accordingly starts off with the statement that expert evidence 'shall be restricted to that which is reasonably required to resolve the proceedings' and in rule 35.4 the court's power in this regard is set out in more detail:

- (1) No party may call an expert or put in evidence an expert's report without the court's permission.
- (2) When a party applies for permission under this rule he must identify –
 - a. the field in which he wishes to rely on expert evidence; and
 - b. where practicable the expert in that field on whose evidence he wishes to rely.
- (3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).
- (4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

Provisions of part 35

Part 35 of the CPR is set out in Appendix V and careful perusal shows the shift towards the expert being almost a neutral participant, giving the court and any party the benefit of his expertise.

An interesting novelty of the new rules is the right of a party to put questions to the other side's expert. Written questions may be put once only and must be put within 28 days of service of the expert's report. They must be for the purpose only of clarification of the report, unless in any case the court gives permission or the other party agrees. An expert's answers to questions will be treated as a part of the expert's report. There are sanctions on the expert and the party instructing him in that rule 35.6 (4) provides that, where a party has put a written question to an expert instructed by another party and the expert does not answer that question, then the court may make an order that the instructing party may not rely on the evidence of that expert. Alternatively the court can order that he may not recover the fees and expenses of that expert from any other party.

Rule 35.11 provides that where a party has disclosed an expert's report, any other party may use that expert's report as evidence at the trial. This is

an important step in cutting out duplication and expense in multi-party actions.

11.2 Contents of the final report

Practice Direction 35

The Practice Direction to Part 35 contains guidelines on expert's reports. Reports must be addressed to the court and not to the party from whom the expert has received his instruction and paragraph 1.2 provides that an expert's report must:

- (1) give details of the expert's qualifications,
- (2) give details of any literature or other material which the expert has relied on in making the report,
- (3) say who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision,
- (4) give the qualifications of the person who carried out any such test or experiment, and
- (5) where there is a range of opinion on the matters dealt with in the report—
 - (i) summarise the range of opinion, and
 - (ii) give reasons for his own opinion,
- (6) contain a summary of the conclusions reached,
- (7) contain a statement that the expert understands his duty to the court and has complied with that duty (rule 35.10(2)), and
- (8) contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based (rule 35.10(3)).

Paragraph 1.3 of the Practice Direction provides that the report must be verified by a 'statement of truth' and paragraph 1.4 sets out the precise words to be used. The significance of this is that by rule 32.14:

- (1) Proceedings for contempt of court may be brought against a person if he 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.

Professional integrity requires the expert to include only honestly held opinions in his report, but the statement of truth reaffirms this and perhaps might give pause to anyone tempted to exaggerate or prevaricate.

Protocols

Paragraph 1.6 of the Practice Direction provides that in addition, an expert's report should comply with the requirements of any approved expert's protocol'. It is suggested that, in the absence of an approved Expert Witness Protocol (neither the Draft Code of Guidance for Experts/Experts' Notes of Guidance prepared by the Expert Witness Institute, nor TeCSA's Expert Witness Protocol are officially approved) the TeCSA Protocol should be followed, subject to any approved protocol being published and further subject to the directions of any judge of the TCC, the CPR and Practice Directions taking precedence.

Good practice

The report should be set out in a logical and orderly manner and should also contain, as a matter of good practice:

- (1) A description of the expert's relevant experience in this field.
- (2) A statement of on whose behalf the report is produced and the date of the expert's instructions.
- (3) A description of the brief and what the expert was instructed to investigate. It should detail the layout of the report and index, and information on which the report is based. It should identify sources and list authorities.
- (4) A description of the location of the estate/property, ideally by sketch maps, elevation drawings, photographs, plans, etc. and brief background history.
- (5) Each item of claim or the response to claim should be detailed as per the Scott Schedule.
- (6) Comment on the defects or matters in issue giving a clear opinion.
- (7) Comment on the extent of damage and remedial works carried out or to be done.
- (8) The cost of repairs quantified.
- (9) A description of how the expert arrived at his conclusions and on what evidence.
- (10) Cross-reference to the evidence to support the opinions, description, conclusions etc.

Subsequently, when the expert has studied the other side's reports, he should give his views on them to his client's solicitors and counsel. Having given such comments the expert may be requested to produce a further report.

The opinion must follow the facts

In writing his report the expert must follow the golden rule that the opinion must follow the facts. In a sense his reasoning and conclusions may reflect the reasoning of an arbitral award. He makes his finding of fact from various sources of investigation and his instructions, including documentary evidence. He reasons his opinion and conclusions. He may reach his decision in various ways, e.g. from a combination of facts and analysis of calculations and application of formulae applicable, consideration of witness statements and documents, analysis of test results, the views of experts on practice, British standards and codes of practice or from matters of common knowledge. He may also base his opinion on a hypothesis, developed from the facts.

He must set out the facts of the case, describe events, circumstances, or findings, and then give his conclusions and opinion. He must do that in respect of each particular event or investigation. It is noteworthy that in Australia there is a rule of evidence at common law that, except in straight-forward cases where the facts are admitted and readily identified, the opinion of an expert is admissible *only* where the facts upon which his opinion is based are expressly stated (*Trade Practices Commission v. Arnotts* (1990)).

11.3 Report for the claimant

If the expert is acting on behalf of a claimant he must carefully consider the principles of the law of evidence outlined in Chapter 8 and the duty which he has to discharge with regard to the burden of proof. The burden is on the claimant to prove his case on the balance of probability. In other words the expert's explanation of cause and failure must be presented in such a manner as to convince the court that his explanation of events is the most probable and likely one in all the circumstances. He will only be able to do this if he has carefully considered the technical evidence and investigated the probable causes of failure thoroughly. There is no substitute for thorough investigation and meticulous recording of evidence to substantiate conclusions.

Small cases

In a relatively small case or arbitration matter of under, say, £20,000 in value, a report may be fairly straightforward and based on a limited sample of defective units. This approach may also be used where the parties have agreed that the findings of a pilot study can be used as the basis for deciding liability and the scope of remedial work. If the parties can agree that liability should be apportioned accordingly, all well and good, but if a party objects, the case will be decided in the ordinary way on the weight of the actual evidence.

In a small case a report may contain in each section:

- (1) photographs of the defect;
- (2) reproductions of drawings – may be reduced to A4 size for convenience of report or as A3 folded;
- (3) findings on the preliminary site investigations;
- (4) findings on further detailed site investigations;
- (5) causes and reasons for failure;
- (6) reference to legislative and consultative documentation;
- (7) description of remedial works carried out;
- (8) cost of remedial works/repairs (actual or estimated); diminution in value.

Larger cases

In a larger construction case, for example defects on a major housing development, the report may take months of preparation. It is a labour-intensive operation but well worth the effort so far as the client is concerned if success in proving the case or reaching settlement is achieved.

A major report should follow generally the guidelines set out above, observing the requirements of the Practice Direction to Part 35 regarding the contents of experts' reports, but to be more particular they may contain the following:

- the brief;
- the layout of the report, i.e. how the report is constructed and how it is intended to be read – what each volume contains;
- the information on which the report is based;
- the introduction;
- the defects;
- test results;
- remedial works;
- costs.

Within this framework will be:

- the layout of the report;
- the index;
- the site plan;
- plan and cross-sections of various details in question;
- location plan;
- the brief from the client.

The information upon which the report is based

The report should refer to all those documents, etc. that the expert has consulted and on which his opinion is based, for example: the architect's

drawings, the specification, bills of quantity, correspondence, statements, orders, instructions, invoices, manufacturers' instructions, site diaries, weekly reports, monthly returns, day work sheets, site investigations and surveys, previous reports, scientific records and research laboratory tests, results of consultation with specialists, information from subcontractors, their correspondence and records, and advice from quantity surveyors and technical officers.

The introduction

This should present a short history of the building or development in issue and how the problems arose.

Defects

This section should provide a description of each defect, its investigation and how this was carried out, the results, photographs, site plans, tests and results and a discussion of the causes of failure and technical responsibility for failure. Location plans should be included showing the precise location of the problem areas.

Cause and responsibility

The main theme of a specialist's report is that of cause and responsibility. The expert must give his opinion on the probable cause and his reasons for diagnosing the cause. He must also be clear as to who is responsible professionally. It may be one party or body, or it may be several. He must say who is technically responsible and why, and whether or not, the defendant has fallen below the standard one would reasonably expect from a member of his profession or calling.

The lawyers will form their own view on the basis of what the expert says about technical responsibility. A breach of a code of practice, for example, is some indication that the appropriate standard has not been followed and possibly the standard of care was not maintained. A catalogue of design failures and bad workmanship will also tend to suggest evidence of negligence. These are matters for the legal advisers to consider in conjunction with the experts. It should be remembered that the judge will decide the issue on the weight of evidence and arguments.

It is a question of how sufficient the evidence is to persuade the judge to give judgment for the expert's client.

11.4 Report for the defendant

It is always difficult for a defendant's expert to respond to a case without knowing precisely what the other side's expert is going to say. The normal direction is that reports are exchanged simultaneously but it is open to the court, if it would save costs and time in a particular case, to order sequential exchange. In the Technology and Construction Court the rules should prevent games of surprises in inconsistent reports by the use of the Scott Schedule. By this device, meetings and by exchange of reports, both sides' experts know the other side's arguments and can easily follow each item of defect as tabulated in the schedule.

Using its wide powers to control evidence under rule 32.1, the court should also consider as appropriate directing the parties' experts to answer the same question in issue. Unnecessary time and costs are wasted where expert reports do not address the relevant issues and differences. Experts must address the key technical issues.

Objectives

Tactically the defendant's expert must seek to disprove the allegations against his client on technical grounds. He may seek to do this by:

- (1) emphasising different evidence and/or evidence of counterclaim;
- (2) demonstrating there is no damage as a result of the alleged defects;
- (3) arguing that there is less damage than is claimed.
- (4) arguing that his client is not responsible for it in any event;
- (5) demonstrating that there is no scientific evidence, analysis or hypothesis supporting the claimant's allegations.

He may also contest the matter by giving his view that the claimant's damages should be drastically reduced by reason of betterment; for example, where the remedial work substituted superior materials for inferior ones at much greater cost than the original material.

Content

The defence expert's report may therefore be along the following lines:

- (1) list of contents;
- (2) brief;
- (3) background discussion;
- (4) allegations in the Scott Schedule;
- (5) alleged extent of the problem;
- (6) opinion on alleged defects;
- (7) documentation references, for example to bills and drawings;

- (8) discussion of allegations;
- (9) comments on allegations and plaintiff's expert report;
- (10) evidence of condition of the property concerned;
- (11) damage;
- (12) comments on remedial works and extent of betterment.

As well as the above items, the expert must comply with the requirements of the Practice Direction, paragraph 1.2 set out above and include all the specified information.

11.5 Conflicting duties

Once the report has been written, the expert will submit it to the legal advisers who should not take any part in actually writing that report, but they can always advise the expert on matters of law and evidence just as the expert can advise the lawyers on technical matters. If the expert has definite views on matters and has stated these in his report, he should be cautioned about changing such an opinion. He should not be tempted in any way to say things simply to please his client or the lawyers and he should, as a matter of duty, resist any attempt to change his evidence for the sake of tactics. There is a grave danger that if he does so, he will regret it when he stands in the witness box under cross-examination.

If the lawyers advise that certain allegations are vulnerable because the evidence is doubtful, then it is best to drop such matters and concentrate on what can legally be proved in evidence.

The expert cannot afford to forget that although he is the employee of his client and owes to his client a clear professional duty, as an expert witness his duty to the court overrides his duty to the clients. This has been made even clearer following the advent of the Civil Procedure Rules with the reiterated theme that the expert's principal duty is to the court, that he addresses his report to the court and that he can himself approach the court direct for guidance and directions without having to give notice to any party (rule 35.14).

There may be conflict in these duties to the client and the court, which may at time have contradictory interest, if so, then as said by Mr Justice Garland in *Polivitte Limited v. Commercial Union Assurance Company Plc* (1987) there is something wrong with either the client's case or the expert's role.

Single joint expert's report

The conflict may in part be resolved by the new emphasis on the possibility of a single joint expert being appointed, particularly in the smaller cases. Difficulties with this concept have been partly met by the new CPR and, as stated in Chapter 7, the hope is that more use will be made of this facility, a range of opinion on matters in issue being presented to the court by one expert in a single report.

11.6 Presentation of the final report

The report should be easy to read and written in plain, clear language. Jargon must be avoided and all technical terms should be simply explained.

There should be logical progression so that each section leads clearly to the next. Each section should be headed. There must be a clear line of reasoning in describing the defect and in drawing technical reasons for failure. It should be clear on what evidence the expert has based his opinions. There must not be ambiguity or vagueness.

Wherever possible the report should simply refer to a schedule of location of defects or plan of location – this is simple, precise and far more convincing.

The report should be divided into sections along the lines described earlier in this chapter. Shorter rather than longer sentences are preferable, although sometimes it will be necessary to be precise and make specific qualifications. Diagrams, sketches, plans and simple calculations are always of assistance provided there are not too many to confuse.

As to the physical presentation, the report should be properly bound and titled with the name of the firm and the individual who will be giving evidence. The individual responsible should sign the report and date it. The report should be paginated to avoid confusion and should be properly indexed with a list of contents. Photographs should be identified and dated. A description of what is illustrated is essential. The report must be comprehensive with as little need to refer to other documents as possible. Remember that this document will be referred to in the witness box, and it is better to have one document rather than numerous others and various cross-references which may confuse the judge and counsel. The main narrative may be broken up into various issues, ideally in a comprehensive manner, so that each may be dealt with comprehensively.

11.7 Trial preparation

If the action or arbitration is a major one involving important points of law and substantial commercial risks, leading counsel may be instructed by the client's solicitors. In such cases the expert must be prepared to carry out various additional tasks to those outlined in previous chapters, although the expert will be aware of additional duties that may result from disclosure. The expert must bear in mind that, as important as his role may be, that of counsel presenting the case is critical. He is the leader of the case and everyone looks to him for a view as to how the matter will be generally conducted. He is responsible for the conduct of the case in court and, together with the solicitor, is responsible for presentation of the evidence. The expert's duty in this respect is to ensure that the opinion he gives counsel and any technical advice is balanced and objective. Any weaknesses in the technical case must be disclosed as has been emphasised previously in this book, and the expert must always be frank with counsel.

Whilst the expert is the expert in technical/scientific matters, he must accept that counsel is the expert in presentation of the evidence, and how that presentation is conducted may vary from advocate to advocate. It would be impossible to describe the particular needs and requirements of counsel as these vary according to case and advocate.

Counsel is entitled to expect that any expert will not only have a thorough knowledge of the relevant facts, but also all the necessary qualities of an expert witness. It is not counsel's job to train expert witnesses.

Checklist for trial preparation

- Has the expert received all relevant information from those instructing?
- Is disclosure satisfactory?
- Has the expert analysed the evidence?
- Has the expert been able to formulate a clear opinion and conclusion?
- Have expert discussions been held?
- Have the experts agreed a statement of issues and differences?
- Has the expert given his views as to availability for trial and what time he needs to complete his report?

11.8 Procedure at trial

So far as form is concerned, as a matter of practicality the TCC judge may direct that both experts be sworn and each deal with the scheduled items in order, taking evidence of one, then of the other.

Official Referees always had a less formal and more pragmatic approach to dealing with the very complex issues brought before them and this has been extended to other courts by the case-management ethos of the Civil Procedure Rules. By rule 32.1 (Power of court to control evidence):

- (1) The court may control the evidence by giving directions as to—
 - (a) the issues on which it requires evidence;
 - (b) the nature of the evidence which it requires to decide those issues; and
 - (c) the way in which the evidence is to be placed before the court.

and this must extend to the power at the trial itself to direct what order the witnesses are called in and depart from the traditional mode if this would simplify the hearing.

Indeed, the court has long had power to direct that expert witnesses be called after all other evidence has been heard (*Briscoe v. Briscoe* (1966) and *Alpina Zurich Insurance Co. v. Bain Clarkson* (1989)) and this can only be endorsed by the CPR.

Examination-in-chief

Each witness will take the oath in the prescribed manner, give his personal particulars, qualifications and experience and then deal with the technical issues of the case. Ideally this should be a spontaneous conversation between the expert and counsel, although the expert cannot lead the discussion. Usually the report stands as the expert's evidence in chief.

The expert should be careful to answer the precise question and nothing else. He should make his answer clear and unambiguous, and narrate events in chronological sequence. The rules of evidence must be respected, and every fact proved or opinion given must be relevant to the issues in the case. The expert will have with him for the purposes of such examination his final report or any other reports he may choose or counsel may advise. Sometimes evidence in chief is just that, because the expert is merely asked to produce his report. At the hearing the expert will usually be permitted to explain his opinion with particular reference to the real evidence, for example to samples in court or to drawings and sketches.

The expert may find it useful in giving evidence to refer as necessary to site plans, location maps, elevation drawings and specifications by computer presentation. Part 1 of the CPR sets out the overriding objective, stating (rule 1.4(1)) that the court 'must further the overriding objective by actively managing cases' and that active case-management includes '(k) making use of technology'. The complex evidence to be presented in construction cases, much of it originating in project management databases in any event, may well be best presented to the court in this form.

In examination-in-chief counsel is not permitted to ask leading questions, i.e. questions that suggest the answer, except to identify the witness and to give his experience and qualifications or to refer to facts which do not have to be proved.

Counsel should ask short questions which will enable the expert to give a full explanation of his investigations and tests carried out and the reasons for his opinions. However, the expert should remember at all times that he is giving evidence in a court of law, he is not lecturing students or giving a paper to a professional association. He is there primarily to assist the court, particularly if the judge intervenes, seeking clarification of any point.

Finally, the expert should bear in mind that, when he is giving his evidence in this way, the defence or opposing counsel will be noting what he says: any contradiction with his report or with his evidence will be challenged in cross-examination.

Cross-examination

Cross-examination can be a daunting task for those who do not know their case but it should hold no terrors for a thoroughly prepared expert. However, he must prepare himself as far as possible for the unexpected. Sometimes the unexpected question can be dealt with simply and effectively. A

great deal depends on the expert's ability to master the facts and to deal with the technical issues.

The duty of cross-examining counsel is to deflect the strength of the expert's evidence adduced in the examination-in-chief, to chip away at it, so to speak, so that the opposing expert can dissect it and destroy technical arguments and their foundation. One often hears it said that the days of the great lawyers are past but the skills of the cross-examiner are as high as ever, and cross-examination by leading construction counsel should never be underestimated.

The most decisive weapons of the cross-examiner are:

- repetition of question;
- ridicule of the witness; and
- the tactical manoeuvring of a witness so as to ensnare him in an admission favourable to the cross-examiner's client.

These weapons can be used in various guises with questions politely put but potentially lethal. The expert witness must be able to deal with this.

Counsel on the other side may go out of his way deliberately to confuse the expert witness with facts, figures, dates and assumptions. This is to be expected. If the expert is proved wrong, or has good reason to correct himself or change his opinion, then he must do so, otherwise he will lose his credibility and his integrity is cast in doubt.

The expert must never answer a question unless he fully understands it. If he does not understand it, he must ask counsel to clarify it or say he does not understand it.

The expert may be asked for calculations while in the box. If it is a calculation of some complexity it may be appropriate to ask for a short adjournment, but if it is a calculation that the should be able to do he should not have difficulty. Questions put must be answered and experts as so called because they hold themselves out as having appropriate capabilities.

A clear example of examination of an expert involving a calculation occurred in a murder trial when the great advocate Norman Birkett KC, as he then was, was prosecuting the criminal Rouse for murder (see *The Art of the Advocate* by Richard Du Cann). The prosecution's case hinged on the finding of a brass nut, discovered loose on a petrol pipe after a fire destroyed a car in which the victim had been placed by the murderer.

The defence called an expert to claim the fire had been started accidentally and that the nut came loose in the fire. Birkett challenged the expert by asking:

What is the coefficient of expansion of brass?

Witness: I am afraid I cannot answer that out of hand.

Birkett: If you do not know, say so. What do I mean by the term?

Witness: You want to know what is the expansion of the metal under heat.

Birkett: I asked you what is the coefficient of the expansion of brass. Do you know what it means?

Witness: Put that way I probably do not.

Birkett: You are an engineer?

Witness: I dare say I am.

Birkett: Well you are not a doctor or a crime investigator or an amateur detective are you?

Witness: No.

Birkett: Are you an engineer?

Witness: Yes.

Birkett: What is the coefficient of the expansion of brass? Do you know?

Witness: No, not put that way.

The witness here cut a pathetic figure and not one whose opinions would be given much weight by the court.

Birkett used the weapons of ridicule and repetition to pin down his witness who, being an engineer, inevitably felt embarrassed at not being able to answer an apparently straightforward question.

The witness might have been forgiven for not knowing the exact calculation to six decimal places of the coefficient of the expansion of brass, but should at least have been able to tell the court how to obtain the figure, even if could not remember it at the time.

A key area for cross-examination may be the expert's instructions. Experts should therefore be careful about the scope of their authority and understand precisely what it is they have to do. Expert witnesses must also appreciate that in the new cultural regime, privilege and immunity are relics of an adversarial past. Sir Richard Scott speaking at the AGM of the Expert Witness Institute on 22 March 2000 asked:

Why should communications with witnesses or potential witnesses be given that immunity? What public policy reason can possibly override the public interest that a just result should be achieved in litigation other than the limited need that lawyer/client communications should be inviolate? Whatever the answer to that question it cannot, in the new civil justice system, cover communications with experts whose overriding duty is to help the court.

Expert witnesses need to be aware at all times of their standing as such and their vulnerability under cross-examination. It is perhaps surprising that quite a number of experts should go into print with certain views for a professional publication and contradict such views or be embarrassed by them when giving expert evidence. The case of *Cala Homes (South) v. Alfred McAlpine Homes (East) Limited* must serve as a warning to all experts, however eminent. (See Chapters 1 and 12 and Appendix VII)

One of the great attributes of an effective expert witness is that he does justice to his client, the court and the standards of his profession. If he is not of sufficient standing in his profession, it is doubtful whether he will be of any standing as an expert in court.

Judicial examination

In the new cultural environment it may be that the judge who is in charge of the case will want to intervene. Indeed some judges may consider it their duty to do so. This is a matter for the court and the exercise of its discretion. English judges are no longer reactive, they are active to encourage observance of the overriding objective.

Re-examination

The purpose of re-examination is to enable the witness to clarify or correct any statement made during cross-examination that may have been given a misleading emphasis by cross-examining counsel.

Summing up

At the close of the evidence counsel for the defence will sum up. This is followed by the closing speech for the plaintiff. The judge will then consider the evidence and may adjourn the proceedings to consider his judgment. The adjournment may take some weeks while the judge writes his judgment. The court will then re-convene at a fixed time and judgment will be given.

It is interesting for the expert to compare the points made in his report with the points the judge finds proved and accepted. It is also useful for the expert to learn exactly how his views were interpreted and see what lessons can be learnt for the future.

11.9 Checklist for the trial

- (1) Remember your duty is to give an honest, clear and concise view of the matter.
- (2) You must prepare yourself thoroughly for giving evidence and be prepared to answer all technical questions related directly or indirectly to the matters and issues.
- (3) Your primary duty will be to assist the court at the trial and you may be present when the other side's expert is giving evidence. If there are negotiations on a without prejudice basis outside the court room, your presence may be required.
- (4) Once you have taken the oath, you must not speak to anyone, including counsel, solicitor or client, about the case. Once you have finished your evidence you may resume your role of assisting the legal team.
- (5) In the witness box only answer what you are asked. Do not volunteer additional information unless clearly invited.
- (6) If you have any doubts about procedural difficulties or requirements

of proof all such questions should be thoroughly discussed beforehand with counsel.

- (7) You are not expected to read your report line for line in the box, but you must, be prepared to explain every allegation you have made, the course of your investigations and your findings. You may refer to research material, professional journals, codes of practice, Building Regulations, textbooks or statutory authorities to support your views if relevant and persuasive.
- (8) When giving evidence at the hearing you should address the judge, not counsel.
- (9) Do not be overawed by cross-examination. Deal with each question as it arises and give a clear, precise and direct answer.
- (10) If there is anything you have said which you subsequently consider wrong, whether in your report or your oral evidence, in chief or in early cross-examination, it is your duty to say so and correct any such matter you consider to have been in error.

Chapter 12

'Che sera sera'

'The true fashion of the courts is . . . not to conciliate or exhort the parties, much less to hurry them . . . but to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste and unnecessary delay.'

Sir Francis Newbolt, Official Referee
(1920–1936)

When Sir Francis Newbolt uttered these words he was speaking of a system established by the Judicature Commissioners in the late 19th century, but he might well have been speaking of the recent civil justice reforms. These reforms have now addressed various abuses in the system by operation of the overriding objective (see Chapter 1). In the expert's context, this makes experts like lawyers more accountable to the court. Lord Woolf has made litigation, in the words of the Senior Master of the Queen's Bench, 'less adversarial' and, as Sir Richard Scott put it, 'given us a case-managed system'.

12.1 The expert and civil justice reformation

Origins of the process

Over the last few years construction dispute resolution has undergone a transformation. The Housing Grants, Construction and Regeneration Act 1996 has made compulsory an interim but extremely swift adjudication process to deal with disputes as they arise during the course of a contract, ADR has been promoted and encouraged and the forward looking practices of the Official Referees and the Commercial Court have been drawn upon, enhanced and made applicable to all courts in the most thorough reforms of the civil justice procedure for 120 years.

Two features of the reform movement can be said to have originated in the United States: the ADR movement led by Chief Justice Warren Berger and Derek Bok of Harvard Law School and the Access to Justice Movement led by Professor Cappelletti and others, a phrase adopted by Lord Woolf for the title of his report.

In England the movement for procedural reform was led by Sir Jack Jacob QC, formerly the Senior Master of the Queen's Bench and Queen's Remembrancer. It was probably Sir Jack Jacob more than any other who accurately described the aim of the reforms as follows:

What seems to be desirable, if not necessary, is to maintain a proper balance between the freedom of lawyers, especially the independence of the Bar, to conduct their cases as they think best in the interests of their clients and the duty of the court, as a matter of public interest and policy, to ensure that once its jurisdiction is invoked, the parties shall use its machinery fairly and faithfully and with due diligence and do not abuse its process. Such balance can perhaps be achieved by retaining the main elements of the adversary system but at the same time improving the system by increasing the active role of the court and by decreasing the active role of the lawyers and their parties.

It would appear that Lord Woolf has succeeded in the balancing of objectives, although economic questions surrounding *Access to Justice* are matters for debate.

The expert's role

In all this the expert's role has been clarified. He is not the servant of the party but he is the adviser of the court. This is explicitly set out in rule 35.3:

- (1) It is the duty of an expert to help the court on the matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Indeed the supremacy of the court is confirmed by rule 1.3 of the CPR in that it is even the duty of the parties to help the court 'to further the overriding objective.' This is to deal with cases 'justly' which includes (rule 1.1.(2)):

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

The expert witness must not forget this nor the fundamental reform that will radically affect his role. The expert can no longer afford to be seen as the hack of any lawyer or 'the hired gun' (if such exaggerated epithets were ever true which is doubted). Public suspicion tends to breed in an industry where people are well known to each other.

In the system that now prevails it is very important that, so far as experts are concerned, there is no hint of bias or prejudice. In England such instances are very rare and experts appearing in the TCC enjoy on the whole an excellent reputation for impartiality.

Caesar's wife - the expert's reputation

Expert evidence must be and be seen to be the independent view of the expert and not partial, prejudiced or biased so as to give a false or misleading impression to the court. Experts must be careful, therefore, not only in what they write in their reports or in their advice, but also in any other activities (whether professional or academic) and in particular in what they publish. Like Caesar's wife, the expert's reputation for professional integrity and lack of bias must be above suspicion and quite unassailable.

Publications are a difficult area and experts frequently come unstuck by professing one argument in evidence having written previously contradictory articles in various publications. Carelessly expressed opinions, even if written slightly 'tongue in cheek', can come back to haunt you.

Some years ago a leading architect, an arbitrator and expert witness, wrote an article entitled: *An Expert Witness: Partisan With a Conscience*. This was published in *Arbitration*, the journal of the Chartered Institute of Arbitrators. The article semi-whimsically compared the sleight of hand with which the Three Card Trick is worked with the 'sleight of mind' whereby an expert witness selectively presents his data to put forward his client's case in the most favourable light. It also referred to the expert being 'partisan' and a 'hired gun' for the client. In a case where the author of the article was later called as an expert witness, *Cala Homes (South) Limited v. Alfred McAlpine Homes East Limited* (1995), Mr Justice Laddie was aware of this article and, having severely criticised the expert's attitude as expressed in it, concluded:

I re-read [his] report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues.

(Fuller extracts from the judgment quoting the original article are reproduced in Appendix VII.)

The article blamed the system rather than the people who worked in it:

How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?

Mr Justice Laddie noted, but did not give much credence to, the acknowledgement that once the action comes to court or arbitration 'shades of moral and other constraints begin to close upon' the expert. This may have been

because of the tone of regret that had been imparted to these words. However, it must be borne in mind that the article was written in the early 1990s and the system complained of is now changed. As stated above, the expert's duty to the court is paramount and expressly stated in the rules. Not only his evidence on oath but also his report has to be the product of his honest and unbiased belief.

Experts know that under the new rules their reports must be verified by a 'Statement of Truth' (paragraph 1.3 of the Practice Direction to Part 35) and that if not so verified the evidence will not be admitted. Rule 32.14 provides that proceedings for contempt of court may be brought against a person if he makes a false statement in a document verified by a Statement of Truth without an honest belief in its truth.

12.2 Truth and justice

Pragmatic compromise

Sceptics and cynics will always criticise the legal system and find fault with it no matter how good it is comparatively with other systems in the world. Anyone, however, who has read the history of the English common law cannot fail to understand that, as with all things, it may have certain faults and is not perfect, but unlike many other legal systems it has always reached for the highest of standards and is scrupulously honest. It was in that sense no wonder that during various political upheavals the public turned more to the courts for redress than revolution.

As to whether the court searches for the truth that must be a debatable point of legal philosophy outside the scope of this work. But what one can say with confidence is that the judgment of history indicates that truth is well respected in English courts and that an English court of law in many respects replaces the confessional. If that were not the case the system would never have lasted. The judges have addressed this issue and it may be of assistance to experts to understand that there is a difference perhaps between truth and justice: truth is an instrument but not an end of justice. Justice is what the courts dispense as a fair and reasonable and often pragmatic balance under the law: it may not be perfect but it is the best that can be done.

In *Air Canada v. Secretary of State for Trade* (1983) Mr Justice Bingham, as he then was, said:

The concern of the court must surely be to ensure that the truth is elicited, not caring whether the truth favours one party of the other but anxious that its final decision should be founded on a sure foundation of fact . . . In my judgment documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts upon which the decision in the cause will depend.

In the Court of Appeal, however, Lord Denning had remarked that the due administration of justice did not always depend on eliciting truth; it often depended on the burden of proof. For Lord Denning the due administration of justice meant the just decision of the case. In the House of Lords, Lord Wilberforce confirmed Lord Denning's view:

In a contest purely between one litigant and another ... the task of the court is to do and be seen to be doing justice between the parties ... There is no higher additional duty to ascertain some independent truth.

This pragmatic approach is a precursor of the overriding objective of the new CPR and, as set out in the previous section, dealing with a case 'justly' includes the concept of proportionality.

Nevertheless, high regard has always been given to a search for truth as a fundamental ingredient of the search for justice for the two are related if not integrated in the disposal of cases before English courts.

Assisting the court

When Lord Mansfield and his fellow judges in the 18th century decided to recognise the practices of merchants and commercial men in the City of London and elsewhere, that recognition involved the acceptance and the admission of expert evidence. In the Industrial Age that followed, industry and commerce were assisted by that judicial recognition and further boosted by the Judicature Acts of 1873–1875 which provided a more efficient system of administration of justice. Subsequently that became clogged by satellite litigation so that a new system with an emphasis on proportionality and economy case-managed by the court has been introduced.

The expert today is no longer primarily the agent of the client or the adviser of the client, nor of the client's lawyers, but is the adviser to the court. He advises the parties, the lawyers and the court of his opinion. He also has rights under the CPR to go straight to the judges for directions, so that he has a measure of independence from the lawyers. Lawyers can instruct experts and direct the expert as to the conduct of the client's case, but they must not write the experts' report – the court is concerned to hear from the expert in his own words, not legal/scientific jargon but simple English. Provided the expert carries out his instructions, prepares his report thoroughly as required by the client's lawyers and gives evidence in the appropriate manner, then the expert can truly serve the interests of justice. It is in that context that Lord Mansfield's criteria for the admission of such expert opinion and evidence is to be followed:

The opinion of scientific men upon proven facts may be given by men of science within their own science.

'Che sera sera'

The adversarial system which has evolved in England over the centuries, and the common law which has developed through practice has proved itself capable of surviving civil wars, reformations, revolutions and all sorts of economic and social changes.

Any person who is not a lawyer and yet who acts in an advisory/assisting capacity to the courts must be aware of the deep traditions in the law not always apparent to the outsider but of enormous cultural importance. But this country is in the process of change as never before where the balance of justice is tilting towards court management in place of lawyer control.

In this new culture the expert witness has a unique function and duty: he has an overriding essential use in translating technical complexity to simple form for the benefit of the court.

A good expert must remain a person who is good professionally, who has a general grasp of the principles of the law of evidence but is not a lawyer, recognises court procedures and disciplines, and who if called upon to give his opinion can give his opinion openly, honestly and fully to the court.

Since the introduction of the new rules, there has been a general decline in new claims commenced in the Technology and Construction Court. This may be due to parties accepting the rough and ready justice of statutory adjudication and not exercising their option to pursue the matter further through the courts or arbitration, it may be due to the spread of ADR or even due to disparate factors of significance in the economic cycle that defy analysis.

Access to Justice will not be the last word in civil litigation reform and it may take a generation to work through the practical effects of the new Civil Procedure Rules. Although the use of experts in court has been much criticised, in many construction cases they are indispensably necessary to prove the case. For that principal reason their utility will not decline in an ever increasingly competitive industry where commercial interests demand that the industry work more often at the limits of its knowledge.

Appendix I

Expert Witness Institute Model Terms

The Expert Witness Institute Model Terms and Conditions of Engagement

Introduction

- 1.1 The Appointor(s) has/have engaged the Expert to advise or report in accordance with these Terms and Conditions of Engagement.
- 1.2 The Civil Procedure Rules 1998 (the CPR) including any protocol approved thereunder, shall prevail over any part of this document which is inconsistent with the CPR.

Definitions

- 2.1 **Appointor(s)** - means the party or parties instructing the expert, which may be a solicitor, an insurance company, a Government department, a local authority, a corporate body, partnership or other firm or organisation and any individual who seeks advice or the person of advice or an expert report from the expert.
- 2.2 **Instructions** - means the written statement of services required by the appointor of the expert including sufficient details of the relevant issue to enable the expert to comply with the Civil Procedure Rules 1998 and any order of the Court.
- 2.3 **Court** - means any court of Law, Tribunal or body concerned with the process of arbitration or dispute resolution.
- 2.4 **Advisor** - means any expert who is retained to give advice on an issue before it becomes a matter for litigation under the CPR.
- 2.5 **Party's Expert** - means an expert who is instructed to provide advice or a report by one or other of the parties to a dispute (claimant or defendant).
- 2.6 **Single Joint Expert (SJE)** - means an expert who is appointed under the CPR Part 35.7 to submit expert evidence on a particular issue on behalf of all litigating parties.
- 2.7 **The Client(s)** - means the parties, person(s) Government department, local authority, firm or company on whose behalf the appointor(s) has instructed the expert to advise or prepare a report for the court.
- 2.8 **Advice** - means the expert's opinion on an issue which lies within his field of competence or expertise to assist the instructing solicitor in deciding whether or not to initiate court proceedings on behalf of the client.

- 2.9 **Report** – means the written report prepared by the expert for the assistance of the Court in accordance with the CPR Part 35.10.
- 2.10 **Fees & Disbursements** – means the expert’s professional charges for carrying out the appointor’s instructions together with all reasonable expenses incurred in discharging these obligations such as relevant out of pocket expenses including car mileage, first class rail travel, business class air fares, reasonable refreshments and hotel accommodation where an overnight stay is necessary, together with the cost of photocopying, reproduction of diagrams and drawings and other similar expenses incurred in the production of the report, as set out in more detail in Clause 5.
- 2.11 **Legal Aid** – means cases where the Legal Services Commission or such other governmental authority as may be involved is funding a party in legal proceedings.

The Appointor’s/Appointors’ obligations

- 3.1 To provide clear written instructions and copies of all relevant documents.
- 3.2 Where an SJE is appointed, all appointors shall either issue joint instructions or agree to a single set of instructions. The SJE shall not start work until such instructions have been received. Any appointor may issue separate additional instructions to the SJE, in which instance he must send a copy to every other appointor.
- 3.3 To keep the expert informed of and ascertain his availability for all relevant court dates. Where there is more than one appointor, the appointors should agree as to who is to accept that obligation.
- 3.4 In legal aid cases not to instruct the expert to start work until the Legal Services Commission has granted prior authority, or the appointor is a contracted supplier with devolved powers in the relevant category of work.
- 3.5 To deal promptly with the Expert’s requests for information and/or further instructions.
- 3.6 To promptly inform the Expert of the making of any Court Order affecting the Expert and supply the Expert with a copy thereof.

The Expert’s obligations

- 4.1 The expert’s overriding duty is to the Court and he must act with objectivity and independence in carrying out his instructions.
- 4.2 Only to accept appointments where he has relevant qualifications and experience.
- 4.3 To advise the appointor(s) of any conflict of interest (actual or perceived).
- 4.4 To use skill and care when carrying out his instructions.
- 4.5 When instructed to report to the Court, to do so in compliance with the relevant requirements of the CPR (including Practice Directions and any approved protocols) and within any agreed time limit.
- 4.6 When ordered to meet with an expert for an opposing party, to conduct such meeting in accordance with the CPR as defined immediately above.

- 4.7 To deal with written questions from an opposing party on his report within any time limit set by the Court, such replies to form part of the expert's report.
- 4.8 To deal with all other matters promptly and where appropriate, within any time limits agreed by the appointor or set by the court.
- 4.9 Unless otherwise agreed, to prepare an advice and/or report at a cost proportionate to the sums in issue. If in doubt, the expert should seek advice from his appointor(s) as to what is proportionate.
Where the expert becomes aware that his costs are likely to exceed any estimate or quotation given at an earlier date, he must inform the appointor(s) immediately.
- 4.10 To make himself available for court hearings, conferences and other meetings.
- 4.11 To preserve confidentiality.
- 4.12 To remain objective and impartial.
- 4.13 When acting as an SJE, to conduct himself consistent with the principles of fairness and transparency.

Fees and Disbursements

- 5.1 For the avoidance of doubt, no instructions can be accepted where payment is contingent on the outcome of the case. Where deferred terms have been agreed, that fact, together with a statement of interest or enhanced rates applicable to the appointment will be specified in Section 1.
- 5.2 The basis of fees and estimated date for delivery of advice/report are specified in the expert's terms.
- 5.3 Wherever possible, the fee shall be agreed in advance, or an estimate provided to the appointor(s), in which case details will appear in the expert terms.
- 5.4 The charging basis for attendance at a hearing (e.g. fixed fee or hourly/daily (and half daily) rate) is specified in Section 1.
- 5.5 If value added tax (VAT) is to be added that fact and the applicable rate will be specified in section 1.
- 5.6 The point(s) at which invoices will be presented, and any period of credit granted are specified in Section 1.
- 5.7 Where the expert is appointed as an SJE unless otherwise provided for the appointors will be jointly and severally liable for the expert's fees.
- 5.8 The Expert's fees shall be paid in full regardless of the outcome of any assessment by the court.
- 5.9 Disbursements including travel and accommodation costs shall be charged at the cost incurred. They shall include, but not be limited to those listed at clause 1.20.
- 5.10 Where travel time is chargeable, that fact and the hourly rate is specified in Section 1.
- 5.11 Where a cancellation fee may be charged, that fact and the basis of charge are specified in Section 1.

- 5.12 Where questions are posed to an expert under CPR Part 35.6(1)(a) by a party other than his appointor the party posing the questions will bear the cost of the time and any disbursements incurred in replying.
- 5.13 Where a fee note has been rendered, payment must be received in full before any additional instructions will be accepted.
- 5.14 Interim fees may be charged at any reasonable point, e.g., (but not limited to) on production of a draft advice or report. Where the expert reserves the right to seek payments on account, that fact is specified in Section 1.

Disputes

- 6.1 In the event of a dispute over fees, such part as is not disputed shall be paid within the agreed credit period.
- 6.2 Any dispute arising between the expert and appointer shall, if not resolved, be referred to a mediator appointed by EWI.
- 6.3 In the event that mediation does not resolve the dispute, it shall be referred to an arbitrator appointed by EWI. The arbitrator shall deal with costs in his award.

Miscellaneous

- 7.1 The expert shall retain all intellectual property rights over his advice and/or report.
- 7.2 The expert should be identified by name.
- 7.3 These terms are not intended to cover the appointment of the expert as assessor to the court under CPR Part 35.15.

Appendix II

Practice Direction Part 49C – Technology and Construction Court

This Practice Direction supplements CPR Part 49 and replaces, with modifications, Order 36 of the Rules of the Supreme Court

General

- 1.1 This practice direction applies to cases allocated to the Technology and Construction Court ('the TCC').
- 1.2 A TCC claim is a claim which involves issues or questions which are technically complex or for which a trial by a judge of the TCC is for any other reason desirable.
- 1.3 TCC claims may be dealt with either in the High Court or, subject to paragraph 2.3 below, in a county court but cases allocated to the TCC will, unless and until a judge of the TCC otherwise directs, be dealt with by a judge of the TCC.
- 1.4 A judge will be appointed to be the judge in charge of the TCC (currently Mr Justice Dyson).

Commencement of proceedings

- 2.1 Before the issue of a claim form relating to a TCC claim, the claim form, whether to be issued in the High Court or in a county court, should, if it is intended that the case be allocated to the TCC, be marked in the top right hand corner 'Technology and Construction Court'. The case will then be allocated to the TCC. The words 'Technology and Construction Court' should follow the reference to 'The – County Court' or 'The High Court, Queen's Bench Division', as the case may be.
- 2.2 The TCC is a specialist list for the purposes of CPR Part 30 (Transfer) but no order for the transfer of proceedings from or to the TCC shall be made unless the parties have either:
 1. had an opportunity of being heard on the issue, or
 2. consented to the order.
- 2.3 A claim form marked as mentioned in paragraph 2.1 may not be issued in a county court office other than:
 1. a County Court office where there is also a High Court District Registry; or
 2. the office of the Central London County Court.
- 2.4 Where a claim form marked as mentioned in paragraph 2.1 is issued in the Royal Courts of Justice, the case will be assigned to a named TCC judge (the 'assigned

judge') who will have the primary responsibility for the case management of that case. All documents relating to that case should be marked, under the words 'Technology and Construction Court' in the title, with the name of the assigned judge.

Applications

- 3.1 Where a claim form is to be marked as mentioned in paragraph 2.1, any application before issue of the claim form should be made to a judge of the TCC.
- 3.2 If an application is made before the issue of the claim form, the written evidence in support of the application must state, in addition to any other necessary matters, that the claimant intends to mark the claim form in accordance with paragraph 2.1.
- 3.3 Any application in a case which has been allocated to the TCC must be made to a judge of the TCC.
- 3.4 Where there is an assigned judge of a TCC case, any application in that case should be made to the assigned judge but, if the judge in charge of the TCC so authorises or if the assigned judge is not available, may be made to another judge of the TCC.
- 3.5 If an application is urgent and no TCC judge is available to deal with it, the application may be made to any judge who, if the case were not allocated to the TCC, would be authorised to deal with the application.

Case management

- 4.1 Every claim allocated to the TCC will be allocated to the multi-track and the CPR relating to track allocation will not apply.
- 4.2 Where a claim has been allocated to the TCC either on issue (i.e. in every case in which the claim form has been marked 'Technology and Construction Court') or by transfer to the TCC, an application for directions (including an application for a fixed date of hearing) must be made by the claimant within 14 days of the filing by the defendant of an acknowledgement of service or of a defence (whichever is the earlier) or, as the case may be, within 14 days of the date of the order of transfer.
- 4.3 If the claimant does not make an application in accordance with paragraph 4.2-
 1. any other party may do so or may apply for the claim of the claimant in default to be struck out or dismissed; or
 2. a TCC judge may on his own initiative fix a directions hearing.
- 4.4 The provisions of CPR Part 29 and the practice direction supplementing that Part apply to the case management of TCC cases except where inconsistent with this or any other TCC practice direction. But reference in those provisions to a listing questionnaire shall be read as references to a pre-trial review questionnaire and paragraphs 8 and 9 of the practice direction do not apply. Attention is drawn, in particular, to the following provisions of CPR Part 29 and the supplementing practice direction:

CPR Part 29

- rule 29.3(2) (attendance of legal representatives)
- rule 29.4 (agreed proposals)
- rule 29.5 (variation of case management timetable)
- rule 29.6 (pre-trial review (listing) questionnaire)

Practice direction supplementing CPR Part 29

- paragraphs 3.4 to 3.9 (general provisions)
- paragraphs 5.1 to 5.8 (case management conferences)
- paragraphs 6.1 to 6.5 (variation of directions)
- paragraphs 7.1 to 7.4 (failure to comply with case management directions)
- paragraphs 10.1 to 10.6 (the trial)

Case management conference

- 5.1 The first case management conference will take place at the directions hearing referred to in paragraphs 4.2 and 4.3 above.
- 5.2 When the court notifies the parties of the time and date of the hearing of the first case management conference it will also send them a case management questionnaire and a case management directions form. These documents will be in the forms annexed to this practice direction, and marked respectively Appendix 1 and 2.
- 5.3 The parties shall complete, exchange and return both forms by no later than 4pm two days before the date on which the case management conference is to take place. The parties are encouraged to try to agree directions by reference to the case management directions form.
- 5.4 If a party fails to exchange or return the forms by the date specified, the court may make an order which leads to the claim or defence being struck out, or impose such other sanction as it sees fit, or may hold a case management conference without the forms.
- 5.5 At the first case management conference, the court will usually fix the date for trial of the case and of any preliminary issue that it orders to be tried. It will also give case management directions. The directions will usually include the fixing of a date for a pre-trial review.
- 5.6 Whenever possible, the trial of a case will be heard by the assigned judge of that case.

Pre-trial review

- 6.1 When the court fixes the date for a pre-trial review it will also provide the parties with a pre-trial review questionnaire and a pre-trial review directions form. These documents will be in the forms annexed to this practice direction marked respectively as Appendix 3 and 4.
- 6.2 The parties shall complete, exchange and return both forms no later than 4pm two days before the date on which the pre-trial review is to take place. The parties are encouraged to try to agree directions by reference to the pre-trial review directions form.

- 6.3 If a party fails to exchange or return the pre-trial review questionnaire or pre-trial review directions form by the date specified, the court may make an order which leads to the claim or defence and any counterclaim being struck out, or it may impose such other sanction as it sees fit, or it may hold a pre-trial review without the forms.
- 6.4 At the pre-trial review, the court will give such directions for the conduct of the trial as it sees fit.

The Civil Procedure Rules

- 7.1 The Civil Procedure Rules and the practice directions supplementing them apply to TCC cases subject to the provisions of this practice direction and any other TCC practice direction.

Appendix III

The TeCSA Expert Witness Protocol

The Technology and Construction Solicitors Association (TeCSA) was formed to promote the interests of solicitors and their clients conducting business in the Technology and Construction Court and in related arbitration.

The Committee of TeCSA believes that the relationship between solicitor and expert witness is of the utmost importance in view of the duties each owes to the court or other tribunal. This protocol has been prepared with a view to assisting clarity of communication and in order to provide a framework within which solicitors and experts are able to operate freely. It is not intended that this protocol should operate in a rigid way but it is hoped that reference to it will enable experts and solicitors to consider key areas at an early stage.

The publication of this protocol arises out of the TeCSA Response to the Issue Paper on Expert Evidence released by the Access to Justice Team in January 1996. TeCSA hopes that this protocol will encourage independence and impartiality of the expert.

Not all of this protocol will apply to every appointment and there will inevitably be areas which the protocol does not specifically cover. It is intended to keep this protocol under review and comments will be most welcome. TeCSA supports the Code of Practice published by the Law Society and acknowledges comments made by many bodies and individuals as part of the consultation process.

Protocol

A. Section

1 The solicitor shall provide sufficient information to the expert to enable the expert to confirm whether or not the issues, as identified by the solicitor, are matters on which the expert is competent to act as expert witness. The expert should be satisfied that he has the necessary resources to meet the requirements of the appointment, including the required timetable. TeCSA encourages the appointment of experts who maintain active professional practices.

Conflicts and confidentiality

2 The solicitor shall provide the expert with a list of relevant parties and the expert shall state whether or not he has any connection with any of the parties named or to be reasonably inferred from the list to enable the solicitor and the expert to consider whether any conflict of interest exists.

Information

3 The expert should normally expect to provide information about his expertise and experience and suitability for the role for which he is being considered together with details of his proposed basis of charge. If the solicitor intends to approach more than

one person to discuss their potential suitability for appointment as an expert witness, he should inform each expert that he is one of a number under consideration.

Independence of expert

4 In any selection and appointment process the solicitor should remember that a witness who is not selected or whose appointment is subsequently terminated may be free to accept an appointment from other parties. The solicitor may wish to ensure that documentation and information made available as part of any selection process is carefully chosen, commensurate with the requirement to provide relevant information, and that documentation is retrieved at the end of the process or of an appointment. The expert should be reminded that any documentation provided to him is subject to the rules relating to privilege.

B. Brief

5 As soon as possible after the expert has been appointed, the solicitor shall explain the client's commercial and legal objectives in a manner commensurate with the independence of the expert and prepare for the expert a brief which shall be in a form appropriate to the nature and complexity of the matter on which the expert is asked to form an opinion. The Brief will normally contain the following information:

Party making appointment

- Subject matter
- Contacts
- Nature of proceedings
- Timetable fixed in any proceedings and current status
- Pleadings in any action which has commenced
- Details of other experts appointed by the party making appointment and others, if known, with field of expertise.
- In a large or complex matter the method by which experts are to coordinate their services. Is there to be a lead expert with whom other experts will liaise?
- Area in which the expert is called upon to give his opinion.
- Specific issues on which the expert is asked to advise. In an appropriate case the solicitor should prepare a detailed Statement of Issues for the expert.
- Timescale within which the expert is asked to prepare:
- Initial review and advice on technical issues pleaded or assistance in preparing the client's pleaded case
- Draft report for discussion and review of brief report for issue.
Details of key documentation and details of location of all relevant documents. In a straightforward case appropriately bundled documents should accompany the brief but in a complex case the expert may be required to review documentation and the brief itself will contain only limited documentation.
- The brief should outline the principles of privilege and discovery.

6 On receipt of the brief the solicitor and the expert should review the nature and extent of the brief with regard to the role of the expert and those of any other experts appointed by the solicitor. If the expert has been appointed prior to the solicitor's involvement, it is important that a brief is established jointly. The proliferation of experts should be avoided. The solicitor should be aware that there may be no need to

appoint a separate expert in every relevant discipline and that a carefully selected expert may be able to cover more than one area.

7 The solicitor and the expert should keep the brief under review at all times and advise each other of any material changes to relevant issues. The expert should not undertake work outside the brief without the prior approval of the solicitor.

8 The scope of the expert's appointment should be defined and the expert should be appointed in a way that will avoid costs being wasted.

9 The solicitor may wish to discuss with those representing other parties the matters on which expert opinion is required in order to assist and refine the brief.

Timescale

10 The solicitor and the expert shall agree the overall timescale and the programme within which the expert shall work. If either the solicitor or the expert becomes aware of any matter likely to affect that time scale, they should advise the other. The exact timing and sequence will vary from case to case. Consideration should be given to the extent of the expert's required attendance at any hearing. These issues should be discussed at an early stage.

Hearing date

11 The solicitor should keep the expert advised of the time scale set in any litigation or arbitration or of any timetable which is to be met and of any changes that are likely to be made, including in the expected length of or dates of any hearing or trial.

12 The expert when advised of any hearing or trial date on which he is likely to be required to attend or give evidence shall make that date available and inform the solicitor if there are any pre-existing commitments likely to affect the expert's ability to fulfil the appointment.

13 Where the expert has pre-existing commitments the solicitor and the expert shall work together in order that the interests of the client can best be served. The expert shall not take on new commitments which might interfere with his responsibilities under the appointment without first assessing the position with the solicitor.

C. Reports

14 The report should normally be issued to the solicitor as a draft for discussion and should be accompanied by any documents not originally supplied by the solicitor to the expert. The solicitor and the expert should discuss the format of the report, provided that the report remains the independent product, of the expert. It is wise for the solicitor and the expert to test the expert's opinions in the light of alternative facts contended for by the client's opponent.

15 When the expert's report has been finalised it will normally be exchanged by the solicitor and not by the expert. Usually simultaneous exchange is appropriate, but in certain cases sequential exchange may be required. The expert and the solicitor should discuss this early in the appointment. The expert's report and any copyright in it will normally be the property of the client.

16 The expert and the solicitor will need to review the status of the report if the underlying facts change or if the expert's opinion alters.

D. Without prejudice meetings

17 It is common practice for a tribunal to order the parties' expert witnesses to meet to identify those parts of their evidence which is in issue. There is no standard format for such meetings. What follows is intended as a guide.

18 Meetings of experts should normally take place before exchange of the experts' reports. The predominant view of TeCSA is that, if exchange takes place first, it is more likely that 'positions' are taken too early to the detriment of proper discussion at the meeting.

19 The meeting may be most effective if it is chaired by one expert and an agenda agreed in advance. It may also be of value for the experts to exchange key criteria which they wish to discuss, for example, Standards or Codes of Practice or methods of valuation. It is appropriate for the parties' solicitors in conjunction with their experts to identify matters in issue in order to determine items for the agenda. Lawyers and clients should not be present at the without prejudice meeting of experts. It is important that the meeting of experts addresses the matters of expert evidence that relate to the matters in issue in the proceedings. The meeting is not the place for the lawyer to 'surprise' the other party's expert with a new theory or new documents.

20 Close liaison will be necessary between solicitor and expert and amongst experts in order to make best use of the meeting. Normally experts of like discipline will meet together. Occasionally it will be appropriate to have meetings of experts in more than one discipline, usually following the initial meeting. For example; Architect, Structural Engineer and Quantity Surveyor, from all parties, might meet to discuss the nature and extent of remedial works contended for.

E. Notes of without prejudice meetings

21 The expert should report to the solicitor promptly after the meeting and discuss any apparent agreement or narrowing of issues.

22 The expert should, in conjunction with other experts of like discipline, prepare a written note signed by each of them as to matters of opinion on which they are agreed. The note should, where possible, give brief reasons for the views held. It should be remembered that matters of fact are for the tribunal or the agreement of the parties and not matters for the experts to agree between them. Where not all experts can agree a particular point, limited agreements should be explored.

23 If areas of apparent agreement on matters of opinion emerge at a without prejudice meeting, it is good practice to record these promptly to ensure accuracy. It may be appropriate for the expert to reflect on the issues following the meeting. A solicitor should not instruct an expert to apply pressure upon the experts of other parties.

24 The expert does not normally have authority to bind the client, but the solicitor should make sure that the expert is aware of the extent of the expert's authority and that matters which the expert agrees in a note of the meeting may be binding on him. It is good practice for the expert to ensure that all written notes of the meeting are marked 'without prejudice' until clearly agreed by two or more experts.

25 The solicitor shall never impede the expert in reaching agreement or forming an

opinion but can give guidance to the expert in formulating the note to reflect the matters in issue in the proceedings.

F. Expert's duty and reporting

26 The expert shall comply with the requirements of the brief and exercise the reasonable skill and care of a person of the expert's profession, occupation or experience in providing advice on the matters in issue. In giving evidence the expert shall act impartially and owes an overriding duty to the court or tribunal.

27 The expert shall not express a final concluded opinion until all relevant issues of fact have been considered by him. The expert will advise the solicitor if the brief appears incomplete or where the expert believes other information is likely to be available.

28 The expert shall advise and assist the solicitor generally, where appropriate, beyond the matters on which the expert is required to give a formal opinion. The expert's report should contain the substance of the expert's evidence which it is intended to give at the tribunal and should be prepared in a clear and succinct manner. The solicitor and the expert should discuss the format of the report. It is not the role of the expert to make a finding of fact which is in issue. Where an opinion depends upon facts which are in issue, this should be clearly stated.

29 The solicitor shall throughout the currency of the appointment keep the expert up to date with information and issues as they relate to the appointment. The expert shall keep any opinion under review and have regard to all relevant matters when advising and assisting the client and the solicitor. After reports have been exchanged the expert and the solicitor should consider the need for a supplemental report.

G. Fees

30 Fees and terms and conditions should be clearly agreed at the outset of an appointment. An appropriate breakdown, daily rate and hourly rate equivalent should be provided. Fees shall be inclusive except where survey, laboratory or other costs are expressly stated separately.

Payment of fees

31 The expert and the solicitor should consider and agree whether the solicitor appoints the expert and is responsible for the expert's fees, or whether the solicitor acts as agent for the client by whom all invoices are to be paid.

Budget

32 The expert should normally provide a budget for various stages of any appointment where the work is identifiable. The solicitor and the expert should ensure that fees are proportionate to the value or importance of the matters in issue.

33 It should be made clear and agreed at the outset how regularly fee invoices are to be rendered, what degree of information they are to contain and whether they are to be sent to the solicitor or the client. The expert shall provide supporting information

and keep accurate contemporaneous records sufficient to justify the fees claimed or as may be required in any taxation of costs or similar procedure.

Legal expenses insurers

34 The solicitor should always advise the expert in advance where the agreement and payment of the expert's fee is subject to the approval of legal expenses insurers and should immediately notify his expert of any ceiling on fees.

Legal aid

35 If the expert is appointed in a case where the solicitor's client has a legal aid certificate in force the solicitor must advise the expert of the basis on which interim fees can be claimed from the legal aid fund and whether the expert is to be appointed on the basis that the expert's fees may be reduced on legal aid taxation. The solicitor shall advise the expert immediately of any change in the client's legal aid status.

Cancellation and commitment fees

36 Cancellation charges shall only apply if they have been discussed and agreed at the outset of the appointment and where the expert can establish that he has no other appropriate work to undertake. The expert should not normally charge a minimum or commitment fee. The level of charge, which may be on a sliding scale, should aim to compensate the expert for disruption and inefficiency in rearranging his diary at short notice and not aim to provide remuneration for the whole of the period cancelled.

Security

37 Where the solicitor has appointed the expert as agent for the client, the expert may request that the client lodge with the solicitor, or in a designated account, sufficient monies to provide reasonable security for the likely fees of the expert. The solicitor and the client will have regard to the financial status of the client.

TeCSA welcomes comment on this protocol. Write to Marcus Harling at Burges Salmon, Narrow Quay House, Narrow Quay, Bristol BS1 4AH (Tel: 0117-939 2000) Fax: 0117 929 4705 - Email GBBSSTEL@IBMMAIL.COM

Appendix IV

Pre-action Protocol for Construction and Engineering Disputes

Introduction

- 1.1 This Pre-Action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).

Exceptions

- 1.2 A claimant shall not be required to comply with this protocol before commencing proceedings to the extent that the proposed proceedings (i) are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ('the 1996 Act'), (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or (iv) relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure.

Objectives

- 1.3 The objectives of this Protocol are as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:
- (i) to encourage the exchange of early and full information about the prospective legal claim;
 - (ii) to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
 - (iii) to support the efficient management of proceedings where litigation cannot be avoided.

Compliance

- 1.4 If proceedings are commenced, the court will be able to treat the standards set in this Protocol as the normal reasonable approach to pre-action conduct. If the court has to consider the question of compliance after proceedings have begun, it will be concerned with substantial compliance and not minor departures, eg failure by a short period to provide relevant information. Minor departures will not exempt the 'innocent' party from following the Protocol. The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions. For sanctions generally, see paragraph 2 of the Practice Direction – Protocols 'Compliance with Protocols'.

Overview of protocol

General aim

2. The general aim of this Protocol is to ensure that before court proceedings commence:
 - (i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
 - (ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
 - (iii) there is more pre-action contact between the parties;
 - (iv) better and earlier exchange of information occurs;
 - (v) there is better pre-action investigation by the parties;
 - (vi) the parties have met formally on at least one occasion with a view to
 - defining and agreeing the issues between them; and
 - exploring possible ways by which the claim may be resolved;
 - (vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and
 - (viii) proceedings will be conducted efficiently if litigation does become necessary.

The letter of claim

3. Prior to commencing proceedings, the claimant or his solicitor shall send to each proposed defendant (if appropriate to his registered address) a copy of a letter of claim which shall contain the following information:
 - (i) the claimant's full name and address;
 - (ii) the full name and address of each proposed defendant;
 - (iii) a clear summary of the facts on which each claim is based;
 - (iv) the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;
 - (v) the nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;
 - (vi) where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected;
 - (vii) the names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

Defendant's response

The defendant's acknowledgement

- 4.1 Within 14 calendar days of receipt of the letter of claim, the defendant should acknowledge its receipt in writing and may give the name and address of his

insurer (if any). If there has been no acknowledgement by or on behalf of the defendant within 14 days, the claimant will be entitled to commence proceedings without further compliance with this Protocol.

Objections to the court's jurisdiction or the named defendant

4.2

4.2.1 If the defendant intends to take any objection to all or any part of the claimant's claim on the grounds that (i) the court lacks jurisdiction, (ii) the matter should be referred to arbitration, or (iii) the defendant named in the letter of claim is the wrong defendant, that objection should be raised by the defendant within 28 days after receipt of the letter of claim. The letter of objection shall specify the parts of the claim to which the objection relates, setting out the grounds relied on, and, where appropriate, shall identify the correct defendant (if known). Any failure to take such objection shall not prejudice the defendant's rights to do so in any subsequent proceedings, but the court may take such failure into account when considering the question of costs.

4.2.2 Where such notice of objection is given, the defendant is not required to send a letter of response in accordance with paragraph 4.3.1 in relation to the claim or those parts of it to which the objection relates (as the case may be).

4.2.3 If at any stage before the claimant commences proceedings, the defendant withdraws his objection, then paragraph 4.3 and the remaining part of this Protocol will apply to the claim or those parts of it to which the objection related as if the letter of claim had been received on the date on which notice of withdrawal of the objection had been given.

The defendant's response

4.3

4.3.1 Within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 4 months), the defendant shall send a letter of response to the claimant which shall contain the following information:

- (i) the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;
- (ii) which claims are accepted and which are rejected, and if rejected, the basis of the rejection;
- (iii) if a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection;
- (iv) if contributory negligence is alleged against the claimant, a summary of the facts relied on;
- (v) whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim by paragraph 3(iii) to (vi) above;
- (v) the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed;

4.3.2 If no response is received by the claimant within the period of 28 days (or such

other period as has been agreed between the parties), the claimant shall be entitled to commence proceedings without further compliance with this Protocol.

Claimant's response to counterclaim

- 4.4 The claimant shall provide a response to any counterclaim within the equivalent period allowed to the defendant to respond to the letter of claim under paragraph 4.3.1 above.

Pre-action meeting

- 5.1 As soon as possible after receipt by the claimant of the defendant's letter of response, or (if the claimant intends to respond to the counterclaim) after receipt by the defendant of the claimant's letter of response to the counterclaim, the parties should normally meet.
- 5.2 The aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective as defined in Part 1.1 of the Civil Practice Rules.
- 5.3 In some circumstances, it may be necessary to convene more than one meeting. It is not intended by this Protocol to prescribe in detail the manner in which the meetings should be conducted. But the court will normally expect that those attending will include:
- (i) where the party is an individual, that individual, and where the party is a corporate body, a representative of that body who has authority to settle or recommend settlement of the dispute;
 - (ii) a legal representative of each party (if one has been instructed);
 - (iii) where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and
 - (iv) where a claim is made or defended on behalf of some other party (such as, for example, a claim made by a main contractor pursuant to a contractual obligation to pass on subcontractor claims), the party on whose behalf the claim is made or defended and/or his legal representatives.
- 5.4 In respect of each agreed issue or the dispute as a whole, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt.
- 5.5 If the parties are unable to agree on a means of resolving the dispute other than by litigation they should use their best endeavours to agree:
- (i) whether, if there is any area where expert evidence is likely to be required, a joint expert may be appointed, and if so, who that should be; and (so far as is practicable)
 - (ii) the extent of disclosure of documents with a view to saving costs; and
 - (iii) the conduct of the litigation with the aim of minimising cost and delay.

- 5.6 Any party who attended any pre-action meeting shall be at liberty to disclose to the court:
- (i) that the meeting took place, when and who attended;
 - (ii) the identity of any party who refused to attend, and the grounds for such refusal;
 - (iii) if the meeting did not take place, why not; and
 - (iv) any agreements concluded between the parties.
- 5.7 Except as provided in paragraph 5.6, everything said at a pre-action meeting shall be treated as 'without prejudice'.

Limitation of action

6. If by reason of complying with any part of this protocol a claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the claimant may commence proceedings without complying with this protocol. In such circumstances, a claimant who commences proceedings without complying with all, or any part, of this protocol must apply to the court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this protocol.

Appendix V

Civil Procedure Rules Part 35-Experts and Accessors

Duty to restrict expert evidence

- 35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

Interpretation

- 35.2 A reference to an 'expert' in this Part is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.

Experts - overriding duty to the court

- 35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.
(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Court's power to restrict expert evidence

- 35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.
(2) When a party applies for permission under this rule he must identify -
(a) the field in which he wishes to rely on expert evidence; and
(b) where practicable the expert in that field on whose evidence he wishes to rely.
(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).
(4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

General requirement for expert evidence to be given in a written report

- 35.5 (1) Expert evidence is to be given in a written report unless the court directs otherwise.
(2) If a claim is on the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

Written questions to experts

- 35.6 (1) A party may put to -
(a) an expert instructed by another party; or

- (b) a single joint expert appointed under rule 35.7, written questions about his report.
- (2) Written questions under paragraph (1) -
 - (a) may be put once only;
 - (b) must be put within 28 days of service of the expert's report; and
 - (c) must be for the purpose only of clarification of the report, unless in any case -
 - (i) the court gives permission; or
 - (ii) the other party agrees.
- (3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.
- (4) Where -
 - (a) a party has put a written question to an expert instructed by another party in accordance with this rule; and
 - (b) the expert does not answer that question, the court may make one or both of the following orders in relation to the party who instructed the expert -
 - (i) that the party may not rely on the evidence of that expert; or
 - (ii) that the party may not recover the fees and expenses of that expert from any other party.

Court's power to direct that evidence is to be given by a single joint expert

- 35.7 (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.
- (2) The parties wishing to submit the expert evidence are called 'the instructing parties'.
 - (3) Where the instructing parties cannot agree who should be the expert, the court may -
 - (a) select the expert from a list prepared or identified by the instructing parties; or
 - (b) direct that the expert be selected in such other manner as the court may direct.

Instructions to a single joint expert

- 35.8 (1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.
- (2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.
 - (3) The court may give directions about -
 - (a) the payment of the expert's fees and expenses; and
 - (b) any inspection, examination or experiments which the expert wishes to carry out.
 - (4) The court may, before an expert is instructed -
 - (a) limit the amount that can be paid by way of fees and expenses to the expert; and
 - (b) direct that the instructing parties pay that amount into court.
 - (5) Unless the court otherwise directs, the instructing parties are jointly and severally liable^(GL) for the payment of the expert's fees and expenses.

Power of court to direct a party to provide information

- 35.9 Where a party has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to—
- (a) prepare and file a document recording the information; and
 - (b) serve a copy of that document on the other party.

Contents of report

- 35.10 (1) An expert's report must comply with the requirements set out in the relevant practice direction.
- (2) At the end of an expert's report there must be a statement that –
- (a) the expert understands his duty to the court; and
 - (b) he has complied with that duty.
- (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
- (4) The instructions referred to in paragraph (3) shall not be privileged^(GL) against disclosure but the court will not, in relation to those instructions –
- (a) order disclosure of any specific document; or
 - (b) permit any questioning in court, other than by the party who instructed the expert,
- unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

Use by one party of expert's report disclosed by another

- 35.11 Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

Discussions between experts

- 35.12 (1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to –
- (a) identify the issues in the proceedings; and
 - (b) where possible, reach agreement on an issue.
- (2) The court may specify the issues which the experts must discuss.
- (3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing –
- (a) those issues on which they agree; and
 - (b) those issues on which they disagree and a summary of their reasons for disagreeing.
- (4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.
- (5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

Consequence of failure to disclose expert's report

- 35.13 A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

Expert's right to ask court for directions

- 35.14 (1) An expert may file a written request for directions to assist him in carrying out his function as an expert.
- (2) An expert may request directions under paragraph (1) without giving notice to any party.
- (3) The court, when it gives directions, may also direct that a party be served with -
- (a) a copy of the directions; and
 - (b) a copy of the request for directions.

Assessors

- 35.15 (1) This rule applies where the court appoints one or more persons (an 'assessor') under section 70 of the Supreme Court Act 1981 or section 63 of the County Courts Act 1984.
- (2) The assessor shall assist the court in dealing with a matter in which the assessor has skill and experience.
- (3) An assessor shall take such part in the proceedings as the court may direct and in particular the court may -
- (a) direct the assessor to prepare a report for the court on any matter at issue in the proceedings; and
 - (b) direct the assessor to attend the whole or any part of the trial to advise the court on any such matter.
- (4) If the assessor prepares a report for the court before the trial has begun -
- (a) the court will send a copy to each of the parties; and
 - (b) the parties may use it at trial.
- (5) The remuneration to be paid to the assessor for his services shall be determined by the court and shall form part of the costs of the proceedings.
- (6) The court may order any party to deposit in the court office a specified sum in respect of the assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.
- (7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

Appendix VI

Draft Code of Guidance for Experts Under the Civil Procedure Rules 1999 (CPR)

The Code of Guidance, as and when approved by the Vice-Chancellor, will be converted into a Practice Direction; as such, it will have the same status as any other Practice Direction made under CPR. This will be subject to amendment from time to time as the case law on Part 35 develops.

Preamble

This code of guidance is designed to help those who instruct experts (and those instructed) in all cases where CPR applies. It is intended to facilitate better communication and dealings both between the expert and the instructing party and between the parties. Assistance from an expert may be needed at various stages of a dispute and for different purposes, the expert performing a different role in each of these respects. The duty to the court and the duty to act in the best interests of the party instructing the expert (including the expert's advisory role) will differ depending upon the context. When preparing a report for use in evidence at court or when giving oral evidence, however, the expert has an overriding duty to the court. The expert remains under a duty to comply with any relevant professional code of ethics. The court is likely to take into account adherence to the Code of Guidance in exercising its discretion as to costs.

Part I: experts

1. For the purpose of this Code a distinction is drawn between: experts who
 - a. are instructed to act solely in an advisory capacity (advice); and
 - b. asked to give or prepare evidence for the purpose of court proceedings (report).

Experts who are instructed by solicitors on behalf of their client to provide advice owe a duty to the client; in the event that the matter proceeds to litigation the expert's overriding duty is to the court.

2. Those intending to appoint experts ought to consider whether the appointment is appropriate, taking account of the principles set out in Parts 1 and 35 of CPR, for which the following factors ought to be considered:
whether
 - a. evidence will be necessary from an expert witness to prove facts in issue;
 - b. opinion evidence from an expert is relevant and will be helpful in resolving the dispute;
 - c. sub paragraphs a) and b) can be achieved by the appointment of a single joint expert;

- d. the expert has the experience, expertise and training appropriate to the value, complexity and importance of the case; and
 - e. the expert will be able to produce a report within a reasonable time of instruction and at a cost proportionate to the matters in issue.
3. Terms of appointment should be agreed at the outset and should include:
 - a. the basis of the expert's charges (either daily or hourly rates and an estimate of the time likely to be required, or a fee for the services);
 - b. any travelling expenses and other disbursements;
 - c. rates for attendance at court and provisions for payment on late notice of cancellation of a court hearing;
 - d. time for delivery of report;
 - e. time for making payment; and
 - f. whether fees are to be paid by a third party.
 4. Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted, because to do otherwise might contravene the expert's overriding duty to the court.
 5. Experts should be kept informed regularly about any deadlines for the preparation of their *advice* or *reports*, and about any timetable for proceedings.
 6. Those instructing experts should ensure that they give clear instruction, including the following:
 - a. basic information, such as names, addresses, telephone numbers, dates of birth and dates of incidents;
 - b. the nature and extent of expertise which is called for;
 - c. the purpose of requesting the *advice* or *report*, a description of the matter to be investigated, the principle, known issues and the identity of all parties;
 - d. the statement of case (if any), those documents which form part of standard disclosure and witness statements which are relevant to the *advice* or *report*;
 - e. where proceedings have not been started, whether proceedings are being contemplated and, if so, whether the expert is asked only for *advice*; and
 - f. where proceedings have been started, the date of any hearing and in which court and to which track they have been allocated.
 7. Experts who do not receive such clear instructions should request them and withdraw from the case unless such instructions are received.
 8. Those instructing experts should consider whether it is necessary to consult experts in respect of those parts of the statement of case to which their expertise is relevant.
 9. Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so.
 10. It is the duty of experts:
 - a. i) in the case of *advice*, to explain to those instructing them both the strengths and weaknesses of the parties' cases;
ii) to explain in their *reports* to the court the range of opinion as required by Practice Direction 1.2(5)
 - b. to agree a time limit with those instructing experts and to give notice of any delay beyond the deadline as soon as possible;
 - c. to maintain professional objectivity at all times;

- d. when giving or preparing a *report*, or giving evidence either orally or in writing, to assist the court; and
 - e. to supply references in respect of relevant literature or any other material which might assist the court in deciding the case.
11. As and when experts' *advice* becomes a *report*, an opportunity must be afforded to the experts to amend their advice.
12. In providing a report experts:
- a. must address it to the court and not to the parties;
 - b. must express any qualification of, or reservation to their opinion;
 - c. if such opinion was not formed independently, should make it clear from whom the opinion was adopted;
 - d. must not be asked to, and must not amend, expand or alter any part of the *report* in a manner which distorts the experts' true opinion; but
 - e. may be invited to amend, or expand a report to ensure accuracy and internal consistency, completeness and clarity.
13. All experts' *advice* and *reports* should contain the following information, except that sub-paragraphs (f) – (h) inclusive apply only to *reports*:
- a. academic and professional qualifications;
 - b. a statement of the source of instructions and the purpose of the *advice* or *report*;
 - c. a chronology of the relevant events;
 - d. a statement of the methodology used, in particular what laboratory or other tests (if any) were employed, by whom and under whose supervision;
 - e. details of the documents or any other evidence upon which any aspects of the advice or report is based;
- and in the case of experts' reports only:
- f. a statement setting out the substance of all instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
 - g. a declaration that the *report* has been prepared in accordance with this Code; and
 - h. a statement of truth, as required by Part 35.
14. In addressing questions of fact and opinion in any *advice* or *report* experts should keep the two separate and discrete.
15. Where there is conflict of factual evidence, experts:
- a. should not express a view in favour of one or other competing sets of facts, unless, because of their particular learning and experience, they perceive one set of facts as being improbable or less probable, in which case they may express that view, and should give reasons;
 - b. should express separate opinions on every set of facts in issue.
16. Following completion of the *report*, experts should be:
- a. advised whether, and if so when, the *report* has been disclosed to the other side;
 - b. given the opportunity to consider and comment upon other *reports* which deal with the same issues; and
 - c. be kept informed of the progress of the action, including any amendments to the stated case relevant to the expert's opinion.

17. A party may put questions to another party's expert about that expert's *report*
 - a. In accordance with Rule 35.6;
 - b. Within the time limits prescribed within Rule 35.6 (2) and Practice Direction 4.1; or
 - c. Where the expert has sought directions from the court under Rule 35.14. Any such questions should be answered within 28 days.
18. The parties and their lawyers should seek to reach agreement of, and consider taking steps to clarify, the issues by way of:
 - a. conference or discussion with experts; and/or
 - b. discussion between experts for opposing parties in order to identify
 - I. the extent of the agreement between experts;
 - II. the points of disagreement and the reasons for disagreement;
 - III. action, if any, which may be taken to resolve the outstanding points of disagreement; and
 - IV. any issues not raised in the agenda for discussion and the extent to which these issues may be agreed.
19. The parties, their lawyers and experts should co-operate to produce concise agendas for any discussion between experts, which should, so far as possible:
 - a. be circulated 28 days before the date fixed for the discussion;
 - b. be agreed 7 days before the date fixed for the discussion;
 - c. consist of questions which are clearly stated and apply, where necessary the correct legal test;
 - d. consist of questions which are closed in their nature, that is to say capable of being answered 'yes' or 'no'; and
 - e. consist of questions such as to enable the experts to state their agreement or the reasons for their disagreement with each other.
20. The discussion will take place preferably face to face except in small claims and fast track cases. Lawyers for the parties will not usually be present at such discussions.
21. If there has been a discussion, a statement of the areas of agreement and disagreement should be prepared and agreed promptly between the experts, usually before the discussion is concluded. This statement may have to be produced to the court, but shall not be binding on the parties.
22. Those instructing experts must not give, and experts must not accept, instructions not to reach agreement at such discussions on areas within the competence of experts.
23. The use of available audio-visual facilities should be relied upon to avoid unnecessary attendance at court.
24. Those instructing experts should inform them whether attendance at trial will be required, and if so inform them of the date and venue fixed for hearing of the case. In applying to fix dates for the trial, those instructing experts should accommodate, as far as possible, the convenience of experts.
25. Experts must take all steps to ensure availability to attend court, if and when required, but should be alerted to the fact that a solicitor may need to serve a witness summons in the event of difficulties.

Part II: Single joint expert

26. Where parties have agreed to, or the court directs the joint instruction of a single joint expert:
 - a. parties should wherever possible agree the instructions be given jointly, failing which separate instructions shall be given to the single joint expert and a copy be sent to the other party;
 - b. all instructions shall be given in writing;
 - c. paragraphs 6 and 7 of Part I above shall apply.
27. The single joint Expert
 - a. should provide a *report* which complies strictly with the provisions relating to reports of the parties; experts under Paragraphs 12 and 13 of Part I above; and
 - b. may be questioned and shall provide answers in accordance with paragraph 17 above.

Part III: Assessors

28. The following guidance is subject to section 70(1) of the Supreme Court Act 1981 and section 63 of the County Courts Act 1984 respectively, and Article 6(1) of the European Convention on Human Rights, as it appears in schedule 1 to the Human Rights Act 1998.
29. A party may at the outset of the proceedings, if it thinks it would be useful for the court to do so, apply to the court for the appointment of a person of skill and experience to provide an expert opinion on any matter to which the proceedings relate, either in place of the parties' experts or in addition to experts.
30. Where the parties' experts engage in discussions pursuant to Rule 35.12 or paragraphs 18 (b) and 19 above, the parties may request the court to appoint an assessor to preside over the discussions.
31. In requesting the court to appoint an assessor(s) the requesting party should indicate:
 - a. the matter(s) in respect of which assistance of an assessor will be sought;
 - b. the name(s) of the proposed assessor(s); and
 - c. the precise area(s) of expertise to be covered by the assessor(s).
32. Any party requesting the court to appoint an assessor, for the purpose of assisting the court to decide any matter which involves expert opinion, shall notify other parties in writing of such request. Other parties so notified may submit to the court within 14 days their views on the proposed appointment.
33. Assessor(s) shall:
 - a. provide a written report to court; and
 - b. circulate it to the parties.Parties may question the assessor(s) in accordance with CPR Part 35.6 the assessor(s) to file answers with the court and the parties.
34. Where there remains a conflict of expert opinion between the assessor(s) and the parties' experts, any party may apply to the court for permission to call experts to give oral evidence.

Appendix VII

The *Cala Homes* case and the partisan expert

Extracts from the article in Arbitration as quoted in the judgment

How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?

...

[T]he man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game'.

If by an analogous 'sleight of mind' an expert witness is able to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri' is, as the maxim has it, 'suggestio falsi', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them. . . .

Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel called 'a hired gun', so that client and counsel, when considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my partisan?'. The third phase, which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.

Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close upon on him.

Extract from the judgment of Mr Justice Laddie

No doubt it is currently fashionable to say that our legal system makes no pretence to determining the truth. I accept that some people not only say it but also believe it. If it were true then [the expert] would be right in thinking that anything short of outright misrepresentation is permissible in an expert's report and that not only the other party but also the person trying to decide the issue, the 'rustics', are fair game. On

reflection, if [the expert] were right. I am not sure that even outright misrepresentation should be avoided. If litigation is to be conducted as if it were a game of Three Card Trick, what is wrong with having a couple of aces up your sleeve?

In support of his approach, [the expert] relied in his article on a quotation from the Official Referee in a publication called *Construction Disputes: Liability and the Expert Witness* (Butterworths) as follows:

... since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he has not been asked at all. either by his client's opponent's counsel or by the Official Referee or arbitrator.

It is apparent that this provides scant support for [the expert] approach. There is a world of difference between not volunteering evidence on topics on which you have not been asked to express a view and giving misleading answers on topics where you have.

The whole basis of [the expert's] approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by [the expert] is a euphemism for 'misleading selectivity'. According to this approach the flexibility will give place to something closer to the true and balanced view of the expert only when he is being cross-examined and is faced with the possibility of being 'found out'. The reality, of course, will be somewhat different. An expert who has committed himself in writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is cross-examined. Most witnesses would not be prepared to admit at the beginning of cross-examination, as [the expert] effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert's report and then his oral evidence will be contaminated by this attempted sleight of mind. This deprives the evidence of much of its value. I would like to think that in most cases cross-examination exposes the bias. Where there is no cross-examination, the court is clearly at much greater risk of being misled.

In view of the above, it is relevant to remind those concerned with the preparation of experts' reports of some of what Cresswell J. said in *The 'Ikarian Reefer'* [1993] F.S.R. 563:

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v. Jordan* [1981] 1 W.L.R. 246 at 256. *per* Lord Wilberforce.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: *Polivitte Ltd v. Commercial Union Assurance Co. Plc* [1987] 1 Lloyd's Rep. 379 at 386, Garland J. and *Re J* [1990] F.C.R. 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J., supra*). [page 565]

It is clear that in saying that, Cresswell J. had just as much in mind the expert's report as the evidence given orally at trial.

Near the beginning of his report, [the expert] says the following:

I believe that the inspections I have made and the graphic and other material that I have seen are sufficient to enable me to reach an informed opinion on the matters in dispute in the present action that fall within my discipline.

I have no connexion with either of the parties in this action, nor have I any prior acquaintance with instructing solicitors or Counsel. I have no pecuniary or other interest in the outcome of the current litigation.

The clear purpose of these statements was to convey the impression to the plaintiffs and the court that the report was the independent unbiased product of the expert. Some may characterise this as pragmatic flexibility. In my view that impression is simply false.

In the light of the matters set out above, during the preparation of this judgment I re-read [the expert's] report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues. I should point out that there is no material before me which suggests that the defendants' solicitors or counsel, or the defendants themselves, were aware of [the expert] attitude to the drafting of his report.

Appendix VIII

The Expert Witness Institute Model Terms and Conditions Guidance Notes

Following an extensive consultation exercise the Governors of the Expert Witness Institute have now approved model terms for experts to use when approached by solicitors (and others) to provide advice or a report for the court. Although the Civil Procedure Rules provide that the expert's overriding duty is to the court, the contract for the provision of expert witness services is with the instructing solicitor.

To avoid confusion the recommended procedure is that the expert sets out in a letter to the instructing solicitor in a logical format the specific details of his proposed charges, produced on the expert's own professional letterhead. A draft wording of this letter is attached but this can be modified to reflect your personal practice. This should be prepared in duplicate so that the instructing solicitor can sign the copy to indicate acceptance. You should attach to this letter the printed EWI model terms and conditions which will apply except to the extent that you wish to disapply or modify them in your covering letter.

In applying the EWI Model Terms the following checklist may be helpful:

1. When an Expert accepts a professional appointment, he enters into a contractual arrangement with those instructing him. It is important that all terms, including those relating to the expert's responsibilities and to payment, are clearly defined in writing.
2. Experts have responsibilities under the Civil Procedure Rules 1998. Inclusion of, or reference to, the relevant parts thereof within the Expert's Terms & Conditions will assist the Expert in complying with his overriding legal responsibilities and reduce the risk of accepting instructions which could compromise his independence and lead to a breach of any professional ethical code of conduct to which he is subject.
3. The Expert shall, on appointment, issue a Letter of Engagement incorporating or accompanied by his Terms and Conditions. This should not be regarded as a formality or as simply an administrative procedure, but as a necessary action to define the responsibilities of both the Expert and the firm or individual instructing him (the *Appointor*).
4. It is recommended that the Expert agrees his terms with the Appointor before starting work on the assignment and that the Appointor's acceptance of the Expert's terms is obtained under signature.
5. The Expert may be appointed as either:
 - (a) advisor (*Advisor*)
 - (b) expert to one or more parties (*Party Appointed Expert*)
 - (c) expert to all parties (*Single [or Single Joint] Expert*)
6. The Model Terms are designed to cover all three situations, and have been produced in this format in preference to producing three separate versions, as an Expert may be appointed in one capacity but be re-instructed in another.

7. They may be used not only for appointments as Advisor or as expert reporting to a Court, but also for appointments where the Expert is instructed to report to and/or give oral evidence to a tribunal, public enquiry or similar hearing.
8. Members may prefer to issue the Model Terms in standard form together with a Letter of Engagement wherein any variations to the Model Terms may be recited. This will avoid the risk of error and/or omission which can arise if individual terms are drafted for each appointment.
9. Some members may be regularly instructed by medico-legal agencies or similar organisations and be expected to work under the standard terms of such instructing parties. Before accepting those terms, members are advised to consider these Model Terms which may contain clauses which the member would wish to use to add to or amend the terms offered to him.

Note: Where the expert's appointment is as advisor only, the CPR do not apply, but members accepting such appointment are expected to observe the relevant sections of the Code of Guidance for Expert Evidence.

[To be printed on the expert's professional letterheading and modified to reflect the expert's charges and other terms]

To: (Instructing Solicitor)

Date

Dear

**TERMS AND CONDITIONS RELATING
TO THE PROVISION OF EXPERT SERVICES**

My services:

The latest edition of the Model Terms and Conditions of Engagement of an Expert as published from time to time by the Expert Witness Institute (the *Model Terms*), a copy of which is attached, shall apply except to the extent to which they are varied or excluded by agreement in writing or are inconsistent with the under-noted terms.

My appointment is as Advisor/Party Appointed Expert/Single Expert *[delete as appropriate]* (The definition of which appears in the *Model Terms*).

For the avoidance of doubt you have instructed me as principal, and not as agent for your client. In the absence of any response I shall assume that these terms have been accepted by you.

My instructions are set out in your letter of *[enter date]*/You have not yet instructed me in writing and I am unable to start work until you do so. *[select appropriate clause]*

Reference in
Model Terms

Where deferred terms apply, the fees specified elsewhere herein shall be increased by X%. Deferred terms do/do not apply to these instructions. *[select as appropriate]*

5.1

My **hourly rate** for the preparation of my evidence is £*[enter rate]*. Staff working under my direction will be charged at an hourly rate, appropriate to their skills and experience. Details of the rates applicable will be supplied upon request.

5.2

- Subject to the timely provision of information to me, I estimate that the advice or report prepared in response to my instructions will be delivered to the appointor by *[enter date]*. 5.2
- The fee (excluding disbursements) for the advice or report prepared in response to my instructions is estimated/agreed at £X. *[select as appropriate and enter amount]* 5.3
- My **daily rate** for attending a hearing is £ D. That is the equivalent of 10 hours of my hourly rate for preparation and includes time spent travelling and waiting. If I am able to return to my office by 2 pm, I charge a half-day rate of £ H. 5.4
- Value added tax will/will not be added to my charges at the rate in force at the date the fees are rendered. *[select as appropriate]* 5.5
- Fees will be rendered monthly/quarterly or otherwise at longer intervals at the expert's discretion. *[select/amend as appropriate]* 5.6
- Fees rendered are payable on demand/within X days. I reserve/do not reserve the right to charge interest on overdue debts at the rate of R% per annum. *[select/amend as appropriate]* 5.6
- Travel time is chargeable at the rate of X per hour/is not chargeable. *[select/amend as appropriate]* 5.10
- Where I am instructed to prepare for and attend a hearing, and for whatever reason those instructions are revoked, I do/do not reserve the right to make a cancellation charge calculated on the following basis *[enter basis of charge]* (e.g. at a sliding rate according to the period of notice given and the amount of time reserved for the case and/or hearing). 5.11
[select as appropriate adding any further necessary details]
- I do/do not reserve the right to seek payments on account. 5.14
[select as appropriate adding any further necessary detail]
- Please do not hesitate to contact me if there is anything relating to these terms which you would like to discuss.
- Signature: _____

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Abinger (Lord) v. Ashton (1874) LR 17 Eq; 22 WR 582	2
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Alpina Zurich Insurance Co v. Bain Clarkson (1989)(unreported)	159
Andrew Master Homes Ltd v. Cruikshank & Fairweather (1980)(unreported)	46
Anns v. Merton London Borough Council [1978] AC 728; [1977] 2 WLR 1024; (1977) 121 SJ 377; (1977) 75 LGR 555; [1977] JPL 514; (1977) 243 EG 523, 591; [1977] 2 All ER 492, HL	36, 37
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- Canning v. Eve Construction (1989)(unreported) 134
- Caparo Industries plc v. Dickman [1990] 2 AC 605; [1990] 2 WLR 358; [1990] 1 All ER 568; 134 SJ 494; [1990] 1 All ER 568; reversing [1989] QB 653; [1989] 2 WLR 316; (1989) 133 SJ 221 45, 46
- Chin Keow v. Government of Malaysia [1967] 1 WLR 813; 111 SJ 333, PC 46
- Clough v. Tameside and Glossop Health Authority [1998] 2 All ER 971 134
- Consolidated Pneumatic Tool Co v. Ingersoll Sergeant Drill Co. (1908) 125 LJ 106, 25 RPC 74 137
- Council of the Shire of Sutherland v Heyman [1955-95] PNLR 238; (1985) 60 ALR 1; (1985) 59 ALJR 564; (1986) 2 Const LJ 161; (1985) 157 CLR 424 HC (Aus) 36
- D & F Estates Ltd v. Church Commissioners for England [1989] AC 177; [1988] 3 WLR 368; [1988] 2 All ER 992, HL 36, 48
- Davie v. Edinburgh Magistrates (1953) SC 34; 1953 SLT 54 67
- Department of the Environment v. Thomas Bates & Son Ltd [1999] 1 AC 499; [1990] 3 WLR 457; [1990] 2 All ER 943; 50 BLR 61 affirming [1989] 1 All ER 1075; 13 Con LR 1; 44 BLR 88 48
- Derby & Co v. Weldon and Others (No. 9) [1991] 2 All ER 901; *The Times* 9 November 1990 134
- Derry v. Peek (1889) 14 App Cas 337 6
- Donoghue v. Stevenson [1932] AC 562 35, 43
- Dunlop Ltd v. New Garage Co Ltd [1915] AC 79, HL 31
- Dutton v. Bognor Regis Urban District Council *sub nom* Dutton v. Bognor Regis United Building Co [1972] 1 QB 373; [1972] 2 WLR 299; [1972] 1 All ER 462 36
- Emmanuel v. Emmanuel [1982] 1 WLR 669; [1982] 2 All ER 342; (1982) 12 Fam Law 62 137
- English and American Insurance Co v. Smith (Herbert) & Co (A Firm) [1988] FSR 232; (1987) 137 New LJ 148, ChD 135
- English Exporters (London) Ltd v. Eldonwall Ltd [1973] Ch 415; [1973] 2 WLR 435; [1972] 117 SJ 224; [1973] 1 All ER 726; 25 P & CR 379 119
- Felton v. Wharrie (1906) *Hudson's Building Contracts* (4th ed) Vol 2 p. 398.CA 31
- Fidelitas Shipping Co Ltd v. V/O Exportchleb [1966] 1 QB 630; [1965] 2 WLR 1059; [1964] 2 All ER 4; [1965] 1 Lloyd's Rep. 223; CA, reversing [1965] 1 Lloyd's Rep. 13, QBD (Comm Ct) 72
- Foulkes v. Chadd (1782) 3 Day 157 1
- General Mediterranean Holidays v. Patel [1999] 3 All ER 673; (1999) 149 NLJ 1145, QBD (Comm Ct) 135
- Gloucestershire Health Authority v. MA Torpy & Partners Ltd (t/a Torpy & Partners) (1997) 55 Con LR 124; QBD (OR) 61
- H v. Schering Chemicals [1983] 1 WLR 143; (1983) 127 SJ 88; [1983] 1 All ER 849, QBD 119

Hadley v. Baxendale (1854) 9 Ex 341, (1843–1860) All ER 461	30
Hammersmith Hospitals National Health Service Trust and Others v. Troup Bywaters and Anders (A Firm) (2000)(unreported)	60
Harbutt's 'Plasticine' v. Wayne Tank & Pump Co Ltd [1970] 1 QB 447; [1970] 2 WLR 198; 114 SJ 29; [1970] 1 All ER 225; [1970] 1 Lloyd's Rep 15, CA	32
Harmony Shipping Co v. Saudi Europe Line [1981] 1 Lloyd's Rep. 377, CA reversing [1980] 1 Lloyd's Rep 44 (1979)	120
Harris v. Wyre Forest District Council [1990] 1 AC 831; [1989] 2 WLR 790; (1989) 133 SJ 597; [1989] 2 All ER 514; HL	44, 52
Hayes v. James & Charles Dodd (A Firm) [1990] 2 All ER 815; CA	38
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 3 WLR 101; 107 SJ 454; [1963] 2 All ER 575; HL	37, 44, 52
Hoenig v. Isaacs [1952] 1 TLR 1360; [1952] 2 All ER 176, CA	32
Hopkins and Palmer v. Jack Cotton Partnership (1989) 45 EG 163	38
Imperial College of Science and Technology v. Norman and Dawbarn (A Firm) (1986) 2 Const LJ 280; (1987) 8 Con LR 107	57, 118
Investors in Industry Commercial Properties Ltd v. South Bedfordshire DC [1986] QB 1034; [1986] 2 WLR 937; [1986] 1 All ER 787; (1985) 5 Con LR 1; (1986) 2 Const LJ 108	61
James Longley v. South West Thames Regional Health Authority (1983) 127 SJ 597	136
James McKinnon v. Courtney Metropolitan Developments Ltd and Elmbridge DC (unreported)	35
James McNaughton Papers Group Ltd v. Hicks Anderson & Co (a firm) [1991] 1 All ER 134	46
John George Hawk v. RF Darby (t/a Albion Contractors) and Canterbury City Council (1985)(unreported)	34
Joyce v. Yeomans [1981] 1 WLR 549; [1981] 2 All ER; 21; 125 SJ 34	66
Junior Books Ltd v. Veitchi Co Ltd [1983] AC 320; [1982] 3 WLR 477; (1982) 126 SJ 538; (1981) 21 BLR 66, HL; [1983] 3 All ER 201	35, 49
Kaiso Finance Establishment Anslatt v. John Wedge (1994) (unreported)	72
Ketterman and Others v. Hansel Properties Ltd and Others [1987] AC 189; [1987] 2 WLR 312; (1987) 131 SJ 134; [1988] 1 All ER 352	34
Lanphier v. Phipos (1831) 8 C & P 475	46
Leigh and Sillavan Ltd v. Aliakmon Shipping Co. [1986] AC 785; [1986] 2 WLR 902; (1986) 130 SJ 357; [1986] 2 All ER 145; [1986] 2 Lloyd's Rep 1; (1986) 136 New LJ 415	36
McAlpine (Humeroak) Ltd v. McDermott International (No.1) (1992) 58 BLR 1; 28 Con LR 76; (1992) 8 Const. LJ 383, C.A. reversing 51 BLR 34; 24 Con LR 68	33
Midland Bank Trust Co Ltd v. Hett, Stubbs and Kemp (A Firm) [1979] Ch 384; [1978] 3 WLR 167; (1977) 121 SJ 830; [1978] 3 All ER 571	63
Moore (DW) & Co. v. Ferrier [1988] 1 WLR 267; (1988) 132 SJ 227; [1988] 1 All ER 418 CA	40
Morgan Crucible Co plc v. Hill Samuel Bank Ltd [1991] Ch 259; [1991] 2 WLR 655; [1990] 140 New LJ 1605; [1991] 1 All ER 142, CA reversing [1990] 3 All ER 330	46

Murphy <i>v.</i> Brentwood District Council [1991] AC 398; [1990] 3 WLR 414; [1990] 2 All ER 908 H.L. reversing [1990] 2 WLR 944; [1990] 2 All ER 269	37, 47, 48
Northern Regional Health Authority <i>v.</i> Derek Crouch Construction Co [1984] QB 644; [1984] 2 WLR 676; [1984] 2 All ER 175; (1984) 128 SJ 279; (1984) 26 BLR 1 CA affirming (1983) 24 BLR 60	89
Ollet <i>v.</i> Bristol Aerojet Ltd (Practice Note) [1979] 1 WLR 1197; (1978) 123 SJ 705; [1979] 3 All ER 544	120
Palmer <i>v.</i> Durnford Ford (A Firm) [1992] QB 483; [1992] 2 WLR 407; [1992] 2 All ER 122; (1991) 14 New LJ 591	51
Peek <i>v.</i> Gurney (1873) LR 6 HL 377 at 403; 43 LJ Ch 19; 22 WR 29	6
Phillips <i>v.</i> Ward [1956] 1 WLR 471. CA; [1956] 1 All ER 874	37
Photo Production Ltd <i>v.</i> Securicor Transport Ltd [1980] AC 827; [1980] 2 WLR 283; (1980) 124 SJ 147; [1980] 1 All ER 556 reversing (1978) 1 WLR 856; [1978] 3 All ER 146	42
Pirelli <i>v.</i> Oscar Faber & Partners (a firm) [1983] 2 AC 1; [1983] 2 WLR 6; (1983) 127 SJ 16; [1983] 1 All ER 65; (1983) EG 979; (1983) 733 New LJ 63, HL; reversing (1982) 263 EG 879, CA	40
Polivitte Ltd <i>v.</i> Commercial Union Assurance Company Plc [1987] 1 Lloyd's Rep. 379, QBD	157
Pozzolanica Lytag <i>v.</i> Bryan Hobson Associates [1999] BLR 267; <i>The Times</i> , 3 December, 1998	64
Pride Valley Foods Ltd <i>v.</i> Hall & Partners (2000)(unreported)	13, 63
<i>R v.</i> Silverlock (1894) 2 QB 766	7
Radford <i>v.</i> De Froberville (Lange third party); <i>sub nom.</i> Radford <i>v.</i> De Froberville [1977] 1 WLR 1262; [1978] 1 All ER 33; (1977) 121 SJ 319; (1977) 35 P. & CR 316; (1977) 7 BLR 35	32
Reynolds <i>v.</i> Maston (1986) QBD unreported	137
Robin Ellis Ltd <i>v.</i> Malwright Ltd (1999)(unreported)	112
Saif Ali <i>v.</i> Sydney Mitchell & Co [1980] AC 831; (A Firm) [1978] 3 All ER 1033, HL	46
Saigol <i>v.</i> Cranley Mansion Ltd and Others (1999)(unreported)	55, 65
Sansom <i>v.</i> Metcalfe Hambleton & Co (1998) 57 Con LR 88; [1998] PNLR 542; [1998] 2 EGLR 103; [1998] 26 EG 154; [1997] EGCS 185; (1998) 95(5) LSG 28; (1998) 142 SJLB 45; [1997] NPC 186; <i>The Times</i> , 29 December 1977 CA	61
Shell Pensions Trust Ltd <i>v.</i> Pell Frischmann & Partners (A Firm) [1986] 2 All ER 911	1, 8
Smith <i>v.</i> Eric S. Bush (A Firm); Harris <i>v.</i> Wyre Forest DC [1990] 1 AC 831; [1989] 2 WLR 790; (1989) 133 SJ 597; [1989] 2 All ER 514, HL	44, 46, 52
Sparham-Souter <i>v.</i> Town and Country Developments (Essex) Ltd [1976] QB 858; 2 WLR 493; [1976] 2 All ER 65; 3 BLR 70; 74 LGR 355; (1976) 241 EG 309; 120 SJ 216, CA	40
Stanton <i>v.</i> Brian Callaghan (1998) 62 Con LR; [1998] 4 All ER 961; [1998] 3 EGLR 165; [1998] EGCS 115	113
SS Bogota <i>v.</i> SS Alconda (1923) SC 526	70
Sutcliffe <i>v.</i> Thackrah [1974] AC 727; [1974] 2 WLR 295; [1974] 1 All ER 859; [1974] 1 Lloyd's LR 318; 118 SJ 148, HL	51

Syrett <i>v.</i> Carr and Neave [1990] CILL 619; (1990) BLR 121; (1990) 6 Const LJ 305, [1990] 2 EGLR 161; [1990] 48 EG 118; 48 EG 118	38
Taylor Woodrow Construction (Midlands) Ltd <i>v.</i> Charcon Structures Ltd (1987) 7 Con LR 1; (1983) 266 EG 40, CA	34
Thomas and Others <i>v.</i> TA Phillips (Builders) Ltd and Taff Ely Borough Council (1986) (unreported)	35
Torrige District Council and Others <i>v.</i> Turner (1991) 59 BLR 31; (1992) 156 JPN 636, <i>The Times</i> 27 November 1991	35
Trade Practices Commission <i>v.</i> Arnotts (1990)	153
Tramountana Armadora SA <i>v.</i> Atlantic Shipping Co SA [1978] 2 All ER 870; [1978] 1 Lloyd's Rep. 391	15
Twomax Ltd <i>v.</i> Dickson, McFarlane and Robinson (1983) SLT 98. OH	45
United Bank of Kuwait <i>v.</i> Prudential Property Services [1995] EGCS 190, CA affirming [1994] 30 EG 103; [1994] 2 EGLR 100 QBD	63
University of Warwick <i>v.</i> Sir Robert McAlpine April 4, 1990, CA unreported; (1988) 42 BLR 1	4
Victoria Laundry (Windsor) Ltd <i>v.</i> Newman Industries Ltd, Coulson & Co (Third Parties) [1949] 2 KB 528; 65 TLR 274; 93 SJ 371; [1949] 1 All ER 997 reversing in part [1948] WN 397; 64. TLR 567; 92 SJ 617; [1948] 2 All ER 806	30
Watt (or Thomas) <i>v.</i> Thomas [1947] 1 All ER 582	66
Watts and Watts <i>v.</i> Morrow [1991] 1 WLR 1421; [1991] 4 All ER 937; (1991) 23 HLR 608; 54 BLR 86; [1991] 43 EG 121; 26 Con LR 98, reversing [1991] 14 EG 111; [1991] 15 EG 113; 24 Con LR 125	38
Whitehouse <i>v.</i> Jordan [1981] 1 WLR 246; [1980] 1 All ER 267; 125 SJ 167, HL ...	3
Worboys <i>v.</i> Acme Investments Ltd (1969) 210 EG 335; 119 New LJ 322; (1969) 4 BLR 133, CA	53
Worlock <i>v.</i> Saws (a firm) and Rushmore Borough Council (1983) 265 EG 774; (1983) 22 BLR 66, CA; affirming 20 BLR 94; (1981) 260. EG 920	34

Table of Statutes

1851 Evidence Act (14 & 15 Vict.c. 99)	
s.16	121
1873–1875 Supreme Court of Judicature Acts (36 & 37 Vict. C. 66)	55
1972 Civil Evidence Act (c. 30)	123, 124
s.3	63
1977 Unfair Contract Terms Act (c.50)	
s.3(2)	
s.11(3)	45
1980 Limitation Act (c.58)	
s.2	39
s.5	40
1981 Supreme Court Act (c. 54)	
s.70(1)	197
1982 Supply of Goods and Services Act (c.29)	
s.13	42
1984 County Courts Act (c.28)	
s.63	197
1986 Latent Damage Act (37)	39, 40
1995 Civil Evidence Act (c.38)	
ss.1–3	122
s.5(1)	123
s.8	126
1996 Arbitration Act (c.23)	
s.37	89
1996 Housing Grants, Construction and Regeneration Act (c.53)	
.....	4, 56, 85, 90, 166

Table of Statutory Instruments

1994 Construction (Design and Management) Regulations (S.I. 1994 No. 3140)	34
1998 Scheme for Construction Contracts (England and Wales) Regulations (S.I. 1998 No.649)	86, 87
Part 1 para 26	88

Rules of the Supreme Court (SI. 1965 No.1776)

Ord.24	127
--------	-----

Table of Civil Procedure Rules (SI 1998 No. 3132)

CPR	4, 6, 10, 54, 85, 111, 123, 152, 170, 171, 190-92
Pt 25, r.25.1(1)	137
r.25.1(3)	137
Pt 31	127
Pt 32, r.32.1(1)	114
(2)	124
r.14	6, 151
Pt 33, r.33.6	127, 189
Pt 35	150, 195, 190-92
r.35.1	99
r.35.2	189
r.35.3	100, 189
r.35.4	99, 189
(1)	
(2)	
(3)	
(4)	189
r.35.5(1)	
(2)	189

r.35.6	189, 197
(1)	189
(2)	190, 196
(3)	134, 190
(4)	150, 190
r.35.7	111
(1)	
(2)	
(3)	190
r.35.8	112
(1)	
(2)	
(3)	
(4)	
(5)	190
r.35.9	191
r.35.10	10, 133
(1)	
(2)	191
(3)	134, 191
(4)	11, 133, 135, 191
r.35.11	191
r.35.12	17, 107
(1)	
(2)	
(3)	
(4)	
(5)	191
r.35.13	191
r.35.14(1)	
(2)	
(3)	192
r.35.15(1)-(7)	192
Pt 36	14, 15

Index

- Academy of Experts, 6, 9
- Access to Justice*, 5, 55, 170
- Accountant, 23
- ADR, 21, 101
 - Development, 102
 - Harvard View, 102
 - Woolf reforms and, 103
- Adjudication, 22, 85
 - Expert as adjudicator, 87
 - Involvement of experts, 87
- Adjudicator, 127
- Admissibility, 123
- Adversarial, 7
 - Adversarial system, 79
- Adversarial approach, 5
- Affirmation, 121
- Anton Piller Order (Search Order), 137
- Appointment, 179, 194
- Arbitration, 89
 - Award, 93
 - Hearing, 92
 - Stages, 91
- Arbitration Act 1996, 89
- Arbitrator's immunity, 94
- Assessors, 192, 197

- Betterment, 32
- Breach of contract
 - By contractor, 32
 - By employer, 31, 32
- Breach of statutory duty, 33
- Budget for fees, 182
- Building Regulations, 34
- Building Surveyor, 23
- Burden of proof, 125

- Case management, 81
- Centre for Dispute Resolution, (CEDR), 21, 104
- Chartered Institute of Arbitrators, 9
 - Rules, 90, 104
- Check lists
 - Disclosure, 141
 - Evidence, 127
 - Scott Schedule, 148
 - Trial, 163, 164
- Civil Evidence Act 1972, 123, 124
- Civil Evidence Act 1995, 122, 126
- Civil Procedure Rules (CPR), 4, 6, 10, 54, 85, 111, 123, 152, 170, 171, 190–92
- Claims, schedule of suggested disciplines for, 27
- Claimant, report for, 153
- Commercial court, 132
- Conciliation, 104
- Conflicting duties, 157
- Construction Manager, 23
- Construction Industry Model Rules (CIMA), 90
- Contract Claims, 24, 26
- Contractual liability, 41–3
- Codes of Conduct, 6
- Costs considerations, 136, 137
- County Courts Act 1984, 197
- Court control of proceedings, 80
 - Concept, 80
 - Powers to exclude evidence, 124
- Cross-examination, 160–62
- Cultural regime, 87

- Damage
 - Latent, 40
 - Patent, 39
- Damages, 30
 - Liquidated, 30
 - Measure of, 37–39
 - For breach, 31
- Defects, 155
- Demeanour, 65,
- Direct evidence, 117
- Direct loss and/or expense, 33
- Disputes, 173
- Disclosure, 12
 - Assisting with, 130

- Before the hearing, 139
- Completing, 140
- Checklist, 141
- Costs considerations, 136
- Early inspection, 137
- Importance of, 128
- Pre-action, 128
- Standard and specific, 127
- What it is, 127
- Draft Code of Guidance, 108–10, 152, 193–7
 - Assessors, 197
 - Experts, 193
 - Single joint experts, 197
- Engineer, 23
- Engineering Contract (ECC), 26
- Evidence, 19, 20
 - Admissibility, 123
 - Conclusive, 119
 - Direct, 117
 - Directions as to, 116
 - Documentary, 126
 - Evaluation of , 123
 - Extrinsic, 119
 - Facts in issue, 116
 - Gathering materials, 73
 - Hearsay, 122
 - Non-disclosable, 131–6
 - Photographic, 126
 - Proof, 125
 - Quantum element in, 138
 - Real, 118
 - Relevance, 116
- Evidence Act 1851, 121
- Evidence of damage, 126
- Examination in chief, 160
 - Examination, judicial, 163
- Examination of site, 125
- Expert determination distinguished, 88
- Expert's evidence, 119
 - Admissibility of, 123
 - Fact and opinion, 120
 - Oral, , 121
- Expert Witnesses, 3
 - Advising on breach of duty, 43
 - Appointment, 9–11, 179, 174
 - Assisting with disclosure, 130–31
 - Definition, 1
 - Discussions, 106–10
 - Duty, 2–5, 16–20, 181
 - To client, 12–14
 - Ethics, 5
 - Evidence, 123
 - Formulating issues, 72–8
 - Giving evidence, fact and opinion, 120
 - Hearing, 19
 - Court's powers, 106
 - Liability of, 49–53
 - Meetings, 17, 112–14
 - Need, 1
 - Preparation for arbitration hearing, 91–2
 - Preparation for trial, 16–17, 158–9
 - Preparing Scott Schedules, 143–8
 - Proportionality, 98–100
 - Qualifications, 7
 - Reputation, 167
 - Role , 42
 - In the TCC, 100–1
 - outside court/arbitration, 21–2, 105
 - Rules, 107
 - Thoroughness, 57–60
- Expert Witness Institute Model Terms, 171–3
- Final Report, 149
 - Contents, 151
 - For the claimant, 153
 - Small cases, 153
 - Larger case, 154
 - Cause and responsibility, 155
 - For the defendant, 156
 - Content, 156–7
 - Objectives, 156
 - Objectives, 149
 - Presentation of, 158
 - Practice Direction 35 provisions, 151
 - Protocol, 152
 - Single joint experts, 157
 - Restrictions on, 150
- Fees and disbursements, 172, 182
 - Cancellation and commitment fee, 183
- Forms of contract, 25–6
- Formulating issues, 72–8
- Giving evidence, 19–20
- Good practice, 152
- Hearing, 19
 - Nature of arbitration, 92
 - At trial 159–63
- Health and safety provisions, 33
- Hearsay evidence, 122

- Implied terms, 41–42
- Indirect Evidence, 117
- Information technology (IT), 147
- Initial advice, 12–14
- Inspection of property, 137
- Institution of Civil Engineers (ICE)
 - Standard Form Contract, 9
 - ICE SF 7th ed, 25
 - ICE Minor Works Form 1998, 25
- Interventionist judge, 82

- Joint Contracts Tribunal Standard Forms
 - Dom/1, 26
 - Fixed Fee, 25
 - Management Contract 1998, 26
 - Minor Works, 25
 - NSC/C, 25
 - Private With/Without Quantities, 25
 - With Contractors Design, 25, 87
- Judicial Committee of the Privy Council, 46

- Judgment in *Cala Homes*, 198–200
- Latent damage, 40
- Latent Damage Act 1986, 39, 40
- Legal aid cases, 171
- Legal expenses insurers, 183
- Limitation Act, 39, 40
- Limitation
 - In tort, 39
 - In contract, 40
 - Latent damage, 40
- Liquidated damages, 30
- Litigation, 96

- Man of skill, 23
- Measure of damages, 37–9
- Mediation, 104–5
- Meetings, 17–18

- Negligence, 35–7
 - Damages, 47
 - Duty of care, 44–6
 - Standard of care 46
- Negotiating issues, 138

- Oath, 121
- Official Referee, 13, 132, 166
- Opinion, 63, 153
 - Court's acceptance of, 67
- Opposing evidence, 21
- Overriding objective, 54–5

- Partial completion, 32
- Partisan, 2
- Pleading, 75
- Practice Direction, 35, 56, 133, 134, 151, 152, 154
 - 49C, 174–7
- Pre-Action Protocol for the Construction and Engineering Disputes, 12, 21, 72, 184–8
 - Compliance, 185
 - Defendant's acknowledgement, 185
 - Defendant's response, 186
 - Letter of claim, 185
 - Limitation of action, 188
 - Objectives, 155
 - Objections to the court's jurisdiction, 186
 - Overview, 185
- Pre-Trial Review Questionnaire, 142
- Privilege, 131, 132
 - Advice or report, 132
 - Concern as to loss of, 135
 - Rules of, 133
- Proof, 125
 - Burden of, 125
 - Standard of, 125
- Proportionality
 - Doctrine of, 84
 - And the expert, 98
- Protocol, TECSA, 178
 - Appointment, 179
 - Budget, 182
 - Cancellation and commitment fee, 183
 - Conflicts, 178
 - Fees, 182
 - Hearing date, 180
 - Independence, 179
 - Legal aid, 183
 - Legal expenses insurers, 183
 - Notes on, 181
 - Reports, 180
 - Security, 183
 - Timescale, 180
 - Without prejudice meetings, 181

- Qualifications, 7
- Qualities of, expert, 22
- Quantity Surveyor, 23
- Quantum, 37–9

- Real evidence, 118–19
- Re-examination, 163

- Relevance, 116
- Report, 3, 180
 - Content, 151
 - Final, 149
 - For claimant, 153
 - For defendant, 156
- Repudiation, 31
- Resolution of disputes
 - Procedures, 79–105
- RIBA, 9
- RICS, 9
- Role of expert, 21, 22, 47, 100, 101, 105
- Scott Schedule, 142
 - Case management aspects, 142
 - Experts' role in, 146
 - Sample, 144, 145
 - Type, 143
- Settlement, 14
- Site investigations, 76
- Single joint experts, 56, 57, 171, 197
- Standard Forms of Contract, 25
- Standard of care, 7
 - Evidence, 60
- Statement of truth, 195
- Statutory duty, breach of, 33
- Technology and Construction Court, 96, 170
 - Business of, 97
- Technology and Construction Court Solicitors Association (TECSA), 98
 - Experts role in TCC process, 100
- TeCSA Protocol 110, 152, 178–83
- Three Card Trick, 199
- Thoroughness, 57–60
- Tort, 36, 37, 39, 43, 47, 48, 51
- Trial, 16
 - Checklist, 163–4
 - Procedure at, 159
 - Preparation for, 57–60, 158
- Truth and Justice, 168
- Uneconomic working, 32
- Unfair Contract Terms Act 1977, 45
- Weight of evidence, 20
- Without prejudice meeting, 181
- Wolf, Inquiry, 55, 56, 57
- Working as a team, 16

