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The Lonely Expert

The Role of the Single Joint Expert in Construction Disputes

Introduction

An expert witness can be defined as an individual with specialized *experience or knowledge in a particular discipline which surpasses that which would be expected of a layperson*. The expert witness' duty is to *provide the court or tribunal with an unbiased opinion regarding the matters in dispute which are within their expertise*.[1] In construction disputes, expert evidence typically involves specialist areas such as architectural, quantum, delay analysis/ scheduling and engineering.

In this article, we shall explore the history, role and challenges faced by single joint experts in construction and engineering disputes.

The Background

The Civil Procedure Rules were introduced in the UK to improve access to justice and reduce litigation costs. Part 35 attempts to address some of the issues regarding expert evidence in civil litigation identified in Lord Woolf's report '*Access to Justice*', namely: excessive costs; lack of independence; the needless production of expert evidence; and the rise of a '*litigation support industry*' to name a few.[2] The Rules were introduced to foster cost-effective litigation practices.

It was Lord Woolf's view that: 'A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up."[3]

Single Joint Expert in Litigation

Under Civil Procedure Rule (CPR) 35.7, the courts can direct that evidence on an issue is given by a single joint expert where the parties wish expert evidence to be submitted that issue. A Single Joint Expert (SJE) is an expert appointed jointly by both parties to a dispute to give expert evidence in proceedings. In the instance that the parties are unable to agree on the expert, then the court is able to choose one from an agreed list of experts prepared or identified by the parties. The court is also empowered to determine that the expert is selected by any other means it deems appropriate.[4]

It is often argued that the disadvantage of having the SJE is that the court or tribunal does not get the benefit of differing opinions which naturally arise from two experts with divergent backgrounds and experiences. A common example of this is having two experienced quantum experts, one from a contracting background, the other from a private quantity surveying practice; the result is typically two separate views based on the same set of facts.

The CPR positively encourage the use of SJEs. Under Practice Direction (PD) 35.7 of the CPR the courts will consider[5]:

[1] Academy of experts; https://academyofexperts.org/users-of-experts/what-is-an-expert-witness/
[2] Lord Woolf, Access to Justice: Final Report 1996 [13], https://webarchive.nationalarchives.gov.uk/20060214041428/http://www.dca.gov.uk/civil/final/sec3c.htm#c13
[3] Lord Woolf, Access to Justice: Final Report 1996 [13.21], https://webarchive.nationalarchives.gov.uk/20060214041428/http://www.dca.gov.uk/civil/final/sec3c.htm#c13
[4] Civil Procedure Rules Part 35.7, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35#IDAJH0HC
[5] Civil Procedure Rules Part 35.7 – see https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35#IDAJH0HC

- The appropriateness for each party to have its own expert taking into account the amount in dispute, the importance to the parties, and the complexity of the issue.
- The practicality of instructing the SJE in the event that a conference may be required with the legal representatives, experts and other witnesses.
- Whether the SJE is likely to resolve the issue more speedily and cost effective than separately instructed experts.
- If the expert evidence falls within a well-established field of knowledge and consequently is not likely to be challenged, or whether there is a likelihood of an extensive range of expert opinion.
- Whether one of the parties has already instructed an expert on the issue in question and if this was done pursuant to any practice direction or relevant pre-action protocol, etc.

This is further endorsed in the Civil Justice Council (CJC) guidance which states, "*Wherever possible, a joint report should be obtained*".[6]

The Technology and Construction Court (TCC) provides guidance on use of SJEs which appear in line with PD 35.7. It contends that SJEs would be unsuitable for disputes on liability, disputes that are large and technically complex or where experts may already have been appointed pursuant to pre-action protocol. However, there seems to be room for the use of SJEs for:

- Low value disputes which require technical evidence, but the cost of each party having its own expert would be disproportionately high;
- a self-contained technical issue which is not necessarily controversial; or
- a situation where a laboratory test can be carried out on behalf of the parties.[7]

Single Joint Expert in Arbitration
In international arbitration, there are some similarities in approach.

For instance, guidance provided by the Chartered Institute of Arbitrators (CIArb) states: *'The resolution of many disputes referred to international commercial arbitration frequently involves deciding complex technical issues which may require specific knowledge or experience. To address this need...(2) parties may jointly agree to appoint a single expert; (3) arbitrators may wish to appoint a single expert instead of the parties doing so; and/or (4) arbitrators may wish to appoint a tribunal-appointed expert in addition to the party-appointed expert(s)".* [8]

The objective of appointing a single expert would be to reduce costs, expedite the process and *reduce the prospect of divergent expert evidence. According to the CIArb guidance, the benefit of having the SJE is to provide '...a more cost-effective method of adducing expert evidence which makes it particularly attractive in cases where the cost*

[6] Civil Justice Council, "Guidance for the instruction of experts in civil claims", paragraph 34 of https://www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf
[7] HM Courts & Tribunal Services, The Technology and Construction Court Guide, paragraphs 13.4.2 and 13.4.3

[8] Chartered Institute of Arbitrators [guidance], 'International Arbitration Practice Guideline on Party-appointed and Tribunal appointed Experts', (2015), page 1

and delay of resolving competing expert opinions would be disproportionate to the sums in dispute."[9]

Whilst having experts appointed by the tribunal in addition to those appointed by the parties will increase costs to the arbitral process, the tribunal may deem it fitting where they require help to decide between differing expert opinions, particularly on complex technical issues. [10] This then raises the question whether in some way, such an expert then becomes, de facto, an arbitrator.

Experiences in other Jurisdictions

As we have seen above, the UK Civil Procedure Rules allow for court discretion as to whether evidence is given by the SJE. Other jurisdictions appear to have gone a stage further.

In Queensland Australia, the Uniform Civil Procedure Rules provide that: "*...if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court"*[11]

In Hong Kong, following *Peace Mark (Holdings) Ltd v Chau Cham Wong Patrick*[12], a growing trend of the use of SJE was noted [13].

The High Court's Rules make provision for the use of a single expert instead of experts appointed by the parties. Rule 4A of Order 38 states: *'(1) In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, Order 2 or more parties to the action to appoint a single joint expert witness to give evidence on that question."*[14]

In Peace Mark (Holdings) the court said: "*It is instructive to note that under Practice Directions 5.2 (Case Management), the court will not give permission to a party to adduce expert evidence unless the appropriateness of appointing a SJE has been considered (§20(1)(c)).*" [15]

It appears that in Hong Kong there is an emphasis on cost efficient litigation proceedings with the use of SJEs being the default position unless parties can justify their appointment as inappropriate.
In the United States, however, the parties prefer to appoint their own experts. Whilst there are court appointed experts, there is no provision for the use of SJEs.

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The Shadow Expert

In jurisdictions such as Australia and Hong Kong, where the use of SJEs is not uncommon, this has brought about use of the "shadow expert" (themselves also known as an expert adviser). A party may wish to appoint a shadow expert to assist in formulation of the case, but this person does not give evidence in the proceedings. Their duty is to the

[9] As above, page 2
[10] As above, page 2
[11] Queensland Uniform Civil Procedure Rules 1999 - Section 423(b)
[12] Peace Mark (Holdings) Ltd (In Liquidation) and Another v Chau Cham Wong Patrick and Others, [2017] HKCU 2782
[13] Yu Christy, "The "Growing Trend" – Appointment of Single Joint Expert (SJE), Deacons
[14] https://www.elegislation.gov.hk/hk/cap4A
[15] [2017] HKCU 2782

party that has appointed them, rather than the court or tribunal.[16] In construction disputes, parties may consider it necessary to have shadow experts particularly where there are substantial sums at stake which rely on quantum and delay expert evidence. Parties may wish to prove the opinions of the SJE by using the shadow expert to review report submissions of the SJE. The shadow expert may also assist in formulating questions that will be used in cross-examining the SJE. The obvious downside of having shadow experts is the additional costs to the proceedings, this is contrary to the purpose of having the SJE. Furthermore, the process could end up with different viewpoints as to the correct outcome; the risk of such an outcome would be similar where a tribunal appoints a single expert along with the experts appointed by the parties.

Important Matters for the SJE

When considering taking an appointment as a single joint expert, the individual in question must consider the following issues:

- The principal and first duty of the SJE, like any other expert witness, is to the court or tribunal. However, as they have been appointed by both parties, they still owe a duty to each party.

- The SJE is instructed by more than one party, consequently, there is even more pressure to ensure that all their dealings with the parties are always meticulously fair and transparent. The SJE must avoid communicating with one party independent of the other(s).[17] If it can be shown that one party has interfered in the SJE arriving at his opinion, the other party may be granted leave to rely on its own expert's report. This was the case in Edwards v Bruce & Hyslop (Brucast) Limited[18] where the court allowed the claimant to rely on its own expert's report, on the grounds that between the SJE's first and second report, unbeknown to the claimant and the court, the defendant's solicitors had been involved in 'clandestine communications' with the SJE.[19]

- There may be a lack of co-operation or resistance (for example in document production) from one party if they were forced into the SJE arrangement where the court had denied them having their own expert. In such situations, a successful outcome may require the SJE exercise skilful diplomacy and determination.

- Solicitors from opposing sides will usually try to agree the instructions and the lead solicitor issues these to the SJE. Where the instructing parties cannot agree on a set of instructions, CPR 35.8 allows each party to issue independent instructions, but these must be copied to the other party and any queries the SJE may have are copied to all the instructing parties. The SJE would need to somehow reconcile the two sets of instructions. It is worth recognising that any queries may take longer to address compared to situations where the expert is instructed by one party only. If the SJE is required to consider different assumptions of fact, then the SJE costs may

[16] https://academyofexperts.org/users-of-experts/what-is-an-expert-witness/
[17] Blackpool Borough Council V Volkerfitzpatrick Ltd & ORS [2020] EWHC 387 (TCC)
[18] [2009] EWHC 2970 (QB).
[19] Edwards v Bruce & Hyslop (Brucast) Limited, https://www.casemine.com/judgement/uk/5a8ff72560d03e7f57ea8966

increase if the SJE must provide multiple opinions to address the permutations raised in the separate instructions.

- The life of the SJE is often a lonely one. Typically, the SJE has had no prior involvement or knowledge of the case. They will have not advised on technical aspects of the dispute prior to formal proceedings. They will have not had any input or influenced the formulation of the pleadings.

Conclusion

It is clear, that to ensure a better outcome from the appointment of an SJE, there needs to be an agreement which covers all facets of the appointment. This should include: clear instructions; terms of reference; a documented and agreed means by which the SJE may seek clarification or any additional information; and agreement on remuneration. To fail to do this as a basic minimum is likely to guarantee a tumultuous process, an awful experience for the SJE and the probability of an unsatisfactory outcome for the parties to the dispute.

The intentions set out by Lord Woolf and implemented through the CPR as they relate to the appointment of SJEs are commendable. However, the reality is that the use of SJEs, especially in the UK, is fairly uncommon whether in litigation or arbitration. This is simply because the criteria established by the CPR for using SJEs would exclude many TCC disputes. There is no appetite for their use in our legal system. Therefore, the SJE will continue to be restricted to cases where the issues are uncontroversial and are not particularly complex. This raises the question that given a significant number of construction disputes referred to adjudication relate to money and time issues, one wonders whether this may be a dispute forum where there could be room for further growth in the use of SJE, thereby reducing the need for parties to appoint their own experts and achieving more mutually satisfactory outcomes?

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