



**RHIANN STOREY**  
**ASSOCIATE DIRECTOR**  
**HKA**

# Great Expectations

## Part One: Client & Lawyer Issues

### Fees

This is an issue that predominantly relates to the client's budget. Clients are often surprised that expert fees are much higher than their project staff.

Expert fees are typically higher than practitioner fees: a site planner or a project quantity surveyor would cost less to engage than a delay or quantum expert. This is due to the specialised knowledge and experience of practising experts, not only relating to technical issues, forensic analysis and report writing abilities, but also, their working knowledge of evidentiary and procedural obligations in the forum within which they are engaged, be that litigation, arbitration, adjudication or expert determination.

Competition drives down expert rates, although sometimes to the detriment of the working relationship, as some less-discerning experts may make a low bid for their services in the knowledge that it can be adjusted later through scope creep. This might win more commissions, but inevitably leads to fee disagreements later down the line if the budget is tight and the costs are unexpected. It will almost certainly affect the working relationship between the client, lawyer and expert if used as a deliberate strategy.

### Costs

Costs can be prohibitive; some clients won't commence formal disputes simply because the costs and risks of doing so are significant, particularly where the disputed amount is proportionately small. Clients paying legal fees in addition to their own staff costs wish expert fees be kept to a minimum.

Lawyers advise that cost issues arise more often where those costs are unexpected rather than simply high. Unexpected invoices are problematic and require adequate explanation. The message from clients and lawyers can be summed up as: **No surprises!**

Costs can escalate for a number of reasons: Increased scope from the client (just look at this too); Budget underestimated by the expert (usually based on vague or unclear scope); Information provided too late, or in a disorganised manner (information dump); Additional meetings or conferences requiring travel, particularly overseas travel; Delays by third parties (other experts, tribunal etc) requiring the expert to work on a stop-start basis, hence losing the built-up information familiarity; and Experts extending their remit.

The client wanted to know if they should go ahead with litigation. An expert was instructed to provide a preliminary view on the matter to advise the lawyers on the prospects of success. The expert estimated a nominal fee, but instead provided a comprehensive report (120 pages) and charged 23 times the amount originally quoted, concluding that the case had no prospect of success. Needless to say, the invoice was disputed, the relationship ruined.

Extreme cases aside, the quality and timing of information has the most dramatic effect on costs; costs and information are two sides of the same coin. Information issues are explored in article two.

## **Delays**

I was surprised to be told that delays were a problem encountered by clients and lawyers. In my experience, there are not many experts who do not hold deadlines sacrosanct.

But I stand corrected – it is perhaps because I am used thinking of procedural deadlines rather than others, but I am told delays are encountered either: prior to commission, where availability is uncertain; during, if there is no tribunal deadline; and after the report has been issued. None of these are delays to a tribunal deadline which was my first thought.

Delays before a commission starts becomes an issue where a particular expert is sought; due to previous experience, good reputation, or niche expert discipline. If the expert is not available, this can delay the whole process. One lawyer told me of a situation where this arose:

The expert advised they were not available for a few months due to another matter, so the client delayed commencing proceedings to accommodate the expert. However, when the allotted time came, that expert was still unavailable and again advised a further few months. The end result was a delay of over a year before the lawyer gave up and found a new expert. This was a case where a niche expert was required and the particular discipline was not common. It would have been better had the expert been honest about their availability.

Clients have reported delays on expert reports for commercial or negotiation purposes. There is an impression that these reports are not prioritised precisely because there is no tribunal deadline, but this does not make the commercial need any less urgent for the client.

Other delays include availability after a report is issued. Some experts, I am told, don't always appreciate that changing court deadlines involves many moving parts (agreement and management of the opposing side, court applications, additional costs etc.) and that being contactable after their report is issued is important to address any potential clarifications.

## **Honesty**

This section is not meant to convey that experts are dishonest or avoiding the long arm of the law: honesty in this context concerns the expert's willingness to be blunt or brutally honest with the client over the weaknesses of the case they are dealing with. Some experts are reluctant to confront difficulties and instead try to sidestep tricky issues.

This creates problems: firstly, the legal team aren't prepared to deal with the shortcomings and secondly, the expert could appear partisan if avoiding weaknesses in the case. It is much easier to be confident under cross examination if weaknesses are flagged and dealt with earlier. Avoiding issues only exacerbates them later.

## **Communication**

As with everything in life, communication is key. Clients, lawyers and experts alike, tend to expect each other to be mind-readers – 'Surely you knew I wanted this to be analysed?' 'Surely you knew I would need this information?' 'Surely you knew I needed you to be available on this date?'

Unfortunately, mind-reading is a rare talent and on the whole, it is better to be explicit, especially during a busy time-pressured case.

Another common problem is crossed wires. It is essential to remember that everyone asks and answers questions from different frames of reference. There are many interpretations to questions depending on your standpoint, and it may not be apparent to the other party what you need and why you are asking. 'Why is this expert asking me pointless questions they shouldn't be dealing with?' 'Why doesn't the client understand I need this basic information?'

An example of this is reflected in typical information requests.

Delay Expert: 'I need the payment certificates and applications please.'

Client/Lawyer: 'What for? The payment amount is not disputed.'

Delay Expert: 'I need all the essential project information to come to an opinion.'

- Or to be more explicit -

Delay Expert: 'I need the payment certificates and applications please.'

Client/Lawyer: 'What for?' I don't want you to exceed your remit, or waste time on things we don't need you to address.

Delay Expert: I need it to evidence a number of things, like payment periods, progress up to a certain date, or to highlight any errors or inconsistencies between the perceived and actual progress.

Client/Lawyer: Well why didn't you say so earlier, here, please take them all.

I was required to assess the variation account and rectification works on a project. A delay report was also commissioned. I needed the delay analysis to complete my valuation exercise, so I requested it – the lawyers did not understand why. I explained that the contract was for a set period and included rise and fall within the rates. As the project was delayed by two years, I needed the delay findings to calculate reasonable rates accounting for the inflation no longer included. Once I had explained why it was necessary, the lawyers were happy I was not going outside of my remit and provided the delay analysis.

Another example of a frame-of-reference difference is over entitlement. Lawyers traditionally see entitlement as their domain but don't always appreciate that contractual entitlement is not the same as contract scope entitlement. The first is usually their domain to comment on, the second, the experts. An obvious example from my discipline is a contract variation: whether the relevant contract clauses have been adhered to is the legal contractual entitlement; whether the work is actually additional to the contract inclusions is scope entitlement.

---

**“Clients need experts and legal professionals they can trust and have frank conversations with.”**

---

Assessing scope entitlement to for a variation might involve checking the method of measurement used in preparation of the tender documents. For example, a variation for fixings might be invalid if the method of measurement used to prepare the tender documents included the fixings.

Contractor clients advise that sometimes they are not very good at articulating exactly what they need and consequently get something they did not realise they had asked for, or don't get something they thought they had asked for. This varies depending on the contractor's experience of experts and disputes in general, and how much experience of uncertain clients the expert has.

### **Writing Style**

This issue was possibly my favourite to discuss because it elicited the most passionate responses. I suspect some experiences triggered pet peeve reactions which are always fun, but especially so when you share them!

A common complaint is that some experts, whilst technically brilliant, are not well-endowed with report writing skills. The following issues were encountered in expert reports:

“The expert had not told the story” - it was not easily understandable to the lay person;

“Hadn't even been proof-read” - it was filled with poor grammar and spelling;

“Internally inconsistent” - where the summary did not match the earlier findings;

Contained “blathering” rather than concise response to points raised;

Highlighted that the expert “had delegated too much to others” not being totally familiar with all the detailed calculations often found deep in the appendices;

Poor report layout, with poorly structured or un-numbered paragraphs or pages; and (my personal favourite)

Over-reached, where experts exceeded their remit – “Stay in your own lane!”

### **Accountability**

Clients, particularly contractor clients are becoming more and more reticent to engage experts and lawyers and even commence disputes due to the perceived lack of accountability of both the experts and legal professionals they have engaged in the past.

The cost of entering disputes as well as the associated risks are becoming prohibitive, even for adjudications. This means that progressing disputes is a much less attractive option, compounded when contractors rely on expert or legal opinions which are not accepted by the tribunal, or subsequently turn out to be wrong.

Contractor clients feel there is no accountability for this. It is the client who pays the price for the wrong opinion, which, for contractors in particular, can affect their turnover for years to come. As one client put it: client's 'can't afford mediocrity, and you don't find out until it's too late.'

There is no easy answer to this conundrum. Clients need experts and legal professionals they can trust and have frank conversations with. Getting preferred experts and lawyers involved earlier can assist but there are also difficulties with having a 'go-to' expert or lawyer because

it sometimes prevents selection of the right professional for the particular needs of the case.

This issue is an interesting one because it's something of a catch-22 situation. Having trust in a professional comes from working and building up a relationship with them, but if costs and risks prohibit this, then developing the trust required for potential future disputes becomes difficult.

\*\*\*

A sentiment shared by most of the clients and lawyers interviewed:

'You appreciate a good expert when you get a bad one!'

Read through to Part 2 [here](#)

If you require any further information, please contact Rhiann Storey at [rhiannstorey@hka.com](mailto:rhiannstorey@hka.com).