Vivien King's talk to junior members of PLA

13 October, 2021

1. **Instructing third parties**

   e.g. Counsel, advisers, expert witnesses and witnesses of fact

2. **Counsel**

   Katie has covered/will cover this topic too but I would just mention a talk I gave some years ago with Michael Driscoll QC (dec'd). We were both speaking about our roles and our difficulties with the other party.

   I explained a solicitor receives instructions from client who dumps a huge pile of paper on one's desk (often only those papers the client wishes to disclose) and gives an explanation of a problem which, when analysed from the legal prospective, does not fit the facts. From all that, the solicitor collects and sorts the relevant papers, puts them into order, analyses the problem and only then instructs counsel. Michael said fine but a pity that only every other page of highly relevant papers (usually the lease) is sent to him! This he discovers at home late at night with a conference with solicitor booked in the morning.

   LESSON for solicitor – check papers *before* they are sent to counsel – photocopying usually done by someone else in solicitor's office who simply feeds papers through copier without checking whether or not print on both sides. You only don't check once!!

   The same goes for court bundles. It is <u>your</u> job to check they are complete – not that of someone in the photocopying department.

3. **Advisers**

   With property litigation, client is very often accompanied by a surveyor (often a valuer) when first meeting with solicitor. He/she is not at this stage an expert witness or even a potential expert witness (no court direction that one might be appointed) although the adviser very often believes that is the role they have undertaken.

   LESSONS for solicitor –

   - Do not automatically accept that an adviser appointed by a client will become an expert witness in any subsequent court proceedings. Talk to the adviser, consider his/her background and the role he/she has taken to date (not only in the relevant case but whether he/she has given evidence in previous cases – if that is the case, check what was said). Very often, correspondence has been entered into or report disclosed or easily made available (e.g. valuation report) which might embarrass the adviser if subsequently engaged in role as expert.

- If there are any doubts about the adviser becoming an expert witness (if and when required) bite the bullet early and discuss with the client (naming potential 'experts' who might subsequently be approached).
- If you feel you are too junior to discuss the matter with the client, go and discuss with the partner heading your group explaining to him/her why you feel the adviser should not be appointed an expert witness. The partner may speak with the client.
- Make position clear to the adviser.

4. Expert Witness

An expert witness can only be appointed to give evidence on direction of the court or third party deciding the issue (e.g. arbitrator, independent expert etc). Check precisely what court has directed – it may require, for instance, one expert witness instructed by both parties.

Re court procedure, consult

- Part 35 of the civil procedure rules (cpr) and its practice statement
- Civil Justice Council Guidance for the instruction of experts in civil claims (Aug 2014)
- If expert witness a surveyor, consult too the RICS Practice Statement and Guidance Note for 'Surveyors acting as expert witnesses' (4th edition) (April 2014)

Selection of the Expert Witness

According to the Civil Justice Council an expert witness must

- have the appropriate expertise and experience for the particular instruction and
- be familiar with the general duties of an expert
- can produce a report, deal with questions and have discussions with other experts within a reasonable time and at a cost proportionate to the matters in issue
- be available to attend the trial, if attendance is required and
- have no potential conflict of interest.

I would add the candidate should

- not only be academically an expert but have the practical experience often necessary in order to express a view on the particular issues upon which his/her opinion is sought
- able to put forward his/her evidence in a way which is readily understood by the judge and the court as a whole and
- be willing and able to work as a member of a team.

LESSON for the solicitor – can you understand and see the significance of what it is the expert is saying and why? If *you* don't understand, why should the judge?

Instructing the Expert Witness

ALWAYS REMEMBER the expert witness is there to give his/her true view on the issue(s) he/she is instructed to consider. He/she is not there to sing from the client's hymn sheet.

Sir Nicholas Browne-Wilkinson V.C. (as was) said in his judgement in *CEMP Properties (UK) Limited v Dentsply Research & Development Corporation* [1991] 2 EGLR 197:

> "*It is a sad feature of modern litigation that expert witnesses, particularly in valuation cases, instead of giving evidence of their actual views as to the true position, enter into the arena and, as advocates, put forward the maximum or minimum figures as best suited to their side's interests. If experts do this, they must not be surprised if their views carry little weight with the judge. In this case, such evidence rightly led the judge to reject the expert evidence on both sides.*"

The expert's instructions should be unequivocal and he/she should be left in no doubt as to the issues upon which he must give a view. He/she should not be requested nor should he attempt to direct his opinion to any matters which do not fall within the ambit of his expertise. If he is an architect, he should not, for instance, be asked to comment upon the functions of a planning consultant.

He/she should not be asked to decide the issue before him – that is for the judge/arbitrator etc. Take, for instance, s30(1)(f) of Landlord and Tenant Act, 1954 which enables landlord to oppose tenant's application for new tenancy:

> *"(f)that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;"*

A building surveyor acting as an expert witness should explain in full the works that the landlord proposes leaving the judge in little doubt that it would not be possible for the tenant to remain in occupation of the premises whilst the works are conducted BUT he/she should not be asked to say that the landlord could not reasonably do the proposed works without obtaining possession of the holding – that is for the judge to decide.

He/she should also know the precise time table with which he/she is expected to comply.

The terms of his appointment must be agreed at the outset (e.g. re interim billing).

A core bundle of relevant papers should be given to him/her relating to the issue on which instructions are given – he/she should not be dumped with every bit of paper that has come to light in connection with the case (although he/she should see court bundles *before* entering the court room).

Remind the expert witness of the contents of Part 35 of cpr if relevant and other documents referred to above. Do so tactfully – he/she is probably more aware of the contents than are you.

Help the expert witness with the Expert's Report if required **but don't write it for them!**

LESSONS for the solicitor –

- Where do I start?!!
- Just stop and think before giving instructions to someone instructed as an expert witness. Remember, they know nothing about the case. Put yourself in their place, review your proposed instructions and ask "Does X know what he/she is being asked to consider?"
- Am I asking him/her to consider the right questions?
- Where do his/her answers leave the client's case?

5. Witnesses of Fact

The statement taken from a witness of fact is often put together by the solicitor after speaking extensively with the witness.

LESSONS for the solicitor –

- It is the witness's statement – not the solicitor's. Wherever possible use words and phrases used by the witness.
- Take care with attachments to statements – do they belong to the witness? If not, how did the witness become aware of them. The solicitor must not create a document for the witness e.g. a plan.
- I was involved in a boundary dispute case which came to court. For our side, the witnesses of fact all stated where they believed the boundary to be and marked their belief on a plan. (The basic plan had been agreed with the other side.) However, we had to admit that the boundaries marked on the individual plans were not identical. The boundaries marked on the other side's plans *were* all identical. This gave us considerable concern but we went ahead. During the trial, my instructed QC (in breach of the normal rule that one does not ask a question to which one does not know the answer) asked one witness for the other side why he had marked the boundary on the plan where he had. The witness looked confused so my instructed counsel said 'go back to when you prepared your statement and plan – now why did you put the line on the plan where you did'. 'Oh,' said the witness 'I didn't put the line on the plan. It was already marked there when the solicitor gave me the plan!' The other side had to accept defeat and we all went off with our witness statements and plans to agree a line of the boundary.

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