A STITCH IN TIME…?

R Peter Davison - Head of DIALES: June 2012

Many will be familiar with the scenario where a lawyer contacts a potential expert witness and says "I need an expert report for service in three weeks and the hearing is in three months…" or other similar approaches. The details of timing might vary but the underlying situation is similar, the case is set, the pleadings and evidence exchanged and the date for hearing is rapidly approaching.

The first difficulty in this situation is that it is not unusual to find the expert is expected to process substantial amounts of information and produce an opinion under unreasonable time restraints, even where the expert is able to provide a report that supports the client's case, thereby creating an unnecessary opportunity for error or an incomplete analysis. The more difficult potential pitfall in this scenario is that the expert might disagree with aspects of the client's case, partially or wholly, or may point out omissions from the case or evidence provided. At such a stage in proceedings the difficulties that can arise are not difficult to imagine and substantial costs may well have been expended in the development of unsupportable or misconceived positions.

The common rationale for not consulting an expert early in the life of a dispute proceeding to some form of formal dispute resolution is that of saving cost but many, obviously enlightened, lawyers appreciate the advantages of engaging experts early in the process. An article featured by the American Bar Association stated "Many litigators and their in-house counsel clients recognise that this process facilitates better decision-making with respect to whether and how to proceed with a case – ultimately resulting in more certainty and a reduction of costs[1]" and then concluded that hiring experts well in advance of imposed deadlines was just good strategy.

This has got to be true. Engaging an objective, qualified and competent practitioner to provide an independent view of the relevant aspects of the case has got to be more beneficial the earlier such advice is obtained in order to obviate the expense of proceeding with ill conceived or badly supported issues.

The benefits should include:

- Early identification of errors and omissions in the case
- Early identification of the factual and technical evidence required
- Creating the basis for pursuing the issues through negotiation or ADR

In the UK the CPR introduced pre-action protocols and the General Aim set out in the Pre Action Protocol for Construction and Engineering Disputes includes the aim of fostering 'better and earlier exchange of information' and encouraging 'better pre-action investigation by the parties[2]'. The early engagement of experts would seem to be a positive step towards achieving those aims.

Indeed the construction and engineering dispute protocol goes on to say that Letters of Claim and the Respondent's Response shall include:

"The names of any experts already instructed by the claimant [respondent] on whose evidence he intends to rely, identifying the issues to which that evidence will be directed[3.]"

[1] 'Early Case Assessment: Get Experts Involved From Day One', Lisa Pierce Reisz and David D Dilenschneider

[2] Pre Action Protocol for Construction and Engineering Disputes: Article 2 General Aim

[3] Pre Action Protocol for Construction and Engineering Disputes: Articles 3(vii) and 4.3.1 (vi)

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Some might take the position that such a mandatory requirement is a reason not to engage experts early in the process, opting for the approach of 'keeping the powder dry', and relying on the "…already instructed…" in the Protocol to provide a reason for not instructing an expert early in the process, but if the expert is known and respected and has had proper opportunity to investigate the issues and evidence the disclosure of such an involvement can only strengthen the claim or response.

In my experience, the earlier the involvement then the greater the opportunity to make a positive contribution to the management of the dispute. For many years a major contractor regularly consulted me when they had a situation that was heading into dispute resolution. The brief was simple: Give us an objective independent view of the quantum issues and our chances of success. The resulting opinion was not always what they hoped to hear but the reason it was a regular occurrence was because they were provided with information that meant they were in a better position, in conjunction with their legal team, to make decisions on the prosecution of their problem. I was of course acting more as an expert advisor rather than an expert appointed in pursuance of litigation but to be of value my research and opinion needed to meet the same standards as those set out for experts in Part 35 of the CPR, as indeed they would have to if my costs were subsequently to be part of a costs submission to a court or tribunal.

It is this distinction between an expert and an expert advisor that offers the opportunity for those reluctant to disclose any expert involvement early in the process to obtain the advantage of valuable expert input without having to reveal that an expert has been engaged or opinion sought as an expert advisor does not come within the definition in the CPR of an expert as a person "…instructed to give or prepare expert evidence for the purpose of proceedings[4]."

However expert advice and opinion is sought there is little doubt that the earlier in the process the greater the potential to make a positive contribution to the client's position, whether that be providing support to the case already set out or identifying defects and deficiencies in the case and evidence.

In the more extreme cases this really can be a case of 'a stitch in time saving nine'.

[4] CPR Part 35: Article 35.2(1)