Experts play an important role in helping to resolve the technical disputes common to the construction and engineering industry: their evidence can make or break a claim or contribute to an early settlement. Civil Procedure Rules (CPR) Part 35 has been evolving over the last few years to give judges more flexibility as to how expert evidence is delivered in court – and judges are adapting to the change of approach, as we explain below.

We also include a tip for those approaching an expert determination process with concerns about the expert's jurisdiction.

Growing support for "hot-tubbing" expert witnesses

"Hot-tubbing" is the colloquial name for the court process of calling expert witnesses to give evidence and be cross-examined concurrently. It also involves the parties' experts engaging in discussion together while in the witness box. Not all court users have warmed to the term: when Lord Justice Jackson reviewed hot-tubbing in his lecture to the Commercial Bar Association of Victoria on 29 June 2016 (Judiciary: Concurrent expert evidence – a gift from Australia), the Australian judges warned him against using the vernacular. They prefer "CEE" – concurrent expert evidence.

Jackson LJ is a supporter of hot-tubbing and thinks it will catch on more widely in England and Wales. He argues it makes judges prepare more thoroughly, can reduce experts' time in the witness box and can thereby reduce costs.

Since Jackson LJ's lecture in June, the findings of the Civil Justice Council's consultation on hot-tubbing have been published: Concurrent expert evidence and "hot-tubbing" in English litigation since the "Jackson reforms": a legal and empirical study. The report emphasises "the overarching purpose of expert evidence (as stated in CPR 35.3) is for those experts 'to help the Court on matters within their expertise'" (page 13). It also explains the various forms of concurrent evidence available such as:
The committee reflected on whether the process saved time, improved the quality of the evidence, assisted the court and saved costs and gave recommendations that included: training for all civil judges; amending the directions and listing questionnaires to ensure that hot-tubbing is at least considered at the Case Management Conference stage; adopting an amended version of PD35 and guidance for the judiciary and practitioners; preparing an information note for expert witnesses and helping the Academy of Experts to create a training video; and ensuring references to hot-tubbing and concurrent evidence in the various court guides are more consistent.

Hot-tubbing is part of a rapidly-evolving area of civil procedure. You can read more about the process here: Will "hot-tubbing" catch on in England and Wales?

Court rules to prevent parties "shopping around" for a supportive expert

All parties to litigation proceedings need permission from the court (under Practice Direction 35.4) to appoint experts and adduce expert evidence relating to the issues in court. However, once the parties have engaged with each other in the pre-action process and the experts have prepared their reports, the experts' duties in relation to that evidence are owed to the court regardless of which party instructed them. If a party does not like the evidence given by "their" expert, they cannot simply change to a different expert: the Civil Procedure Rules (CPR) prevent "shopping around" for an expert witness until one is found whose opinion matches their claim.

Sometimes, for one reason or another, it might become necessary to replace an expert witness. Maybe the expert is ill or has not complied with his instructions. There may be a dispute about fees. In such cases, the court has power under the CPR to allow parties to appoint a new expert – but can also impose terms on those changing their expert. The intention is to dissuade parties from shopping around for "better" evidence if they do not like their current expert evidence. For example, the court can order a party to disclose the previous expert's evidence.

This is what happened in Coyne v. Morgan [2016] B.L.R. 491 (24 May 2016): the TCC ordered the party to waive privilege in the draft report of their first expert and disclose it before they could rely on the evidence of a second. The court in Coyne also confirmed the decision in BMG (Mansfield) Ltd v. Galliford Try Construction Ltd [2013] EWHC 3183 (TCC), that disclosure orders of this type could extend to documents other than the first expert's report if the court believed the party had been "expert shopping". This could include, potentially, previous drafts and solicitors' attendance notes of expert meetings. In Coyne, however, there was no strong evidence of the party engaging in expert shopping and the disclosure order was therefore limited to the draft first report.

The TCC took the Coyne decision a little further in Allen Tod Architecture Ltd v. Capita Property and Infrastructure Ltd [2016] EWHC 2171 (TCC), holding that the court's powers to order disclosure could be used even where there is no

Sequential, back-to-back evidence, which is counsel led and involves one expert then the other giving evidence, being examined, then cross- and re-examined on one issue at a time.

Hot-tubbing, which is described in Practice Direction (PD) 35.11 and led by the judge, who acts as a chair of proceedings in leading the oral examination of the expert witnesses.

Hybrid forms of hot-tubbing, which have arisen as a result of the judge's power to modify the hot-tubbing procedure set out in PD35.11. The variants relate to how the experts are allowed to interact while in the hot-tub, differences in judicial practice in leading (or not) the discussion and differences in counsel's role.

The "teach-in" approach, which involves the parties appointing and paying for a neutral expert adviser to provide a tutorial (or teach-in) to the judge to improve understanding of the technical issues.
hint (or maybe just a small hint) of shopping around. It also confirmed that documents other than the draft reports might also be disclosable depending on the circumstances.

The judge in Allen Tod extracted the key principles from the various authorities and set them out in a useful list at paragraph 32 of the judgment. In essence, if a party wants to change their expert witness for any reason, there is a price: they should be prepared to produce the first expert's report[s] as a condition of being allowed to adduce evidence from a second. If there is any whiff of expert shopping about the change in experts, the party should also be prepared to disclose other relevant documents prepared by the first expert including, for example, the letter instructing the expert and solicitors' attendance notes.

Although the nature of the conditions imposed will depend on the circumstances of the particular case, parties should bear in mind when instructing experts that any documents setting out the expert's opinion are potentially disclosable.

Speak up if you doubt an expert has jurisdiction in an expert determination

If you believe an expert has no jurisdiction to act in expert determination proceedings: speak up! If you just carry on with the process, you are at risk of accepting the expert's authority to decide. That was the lesson dealt out to the claimant in ZVI Construction Co LLC v. University of Notre Dame (USA) in England [2016] EWHC 1924 (TCC). For the background to the case and more detail about the court’s decision, click here.

Tips for expert determination: if there is any issue as to an expert's jurisdiction under the contract, raise it immediately. The courts might interpret your lack of action as an implied agreement to the expert determination mechanism, which could scupper a later challenge of the expert's subsequent decision. Whether or not the expert or other party disagrees with your objection, protest, and reserve your position, clearly and in writing (and continue to reserve your position as the process continues).

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