



How to get the best from your Expert - Practical advice for Instructing Solicitors

GWP Consultants LLP

Senior staff at GWP Consultants LLP (GWP) have been appointed as expert advisors and expert witnesses in cases involving mining, geological, geotechnical, mineral resource and hydrogeological issues for over 50 years. Senior members of staff are frequently called upon to provide expert opinion in technically challenging cases in civil and criminal courts, arbitrations, mediations and planning inquiries.

Examples of questions our experts have been called upon to address:

“Was the information provided at the time of tender sufficient for the contractor to have predicted the amount of blasting that would be necessary to extract the rock from this quarry?”

“Was mining subsidence the trigger for reactivation of an ancient landslide, the movement of which caused significant damage to buildings constructed on and close to the landslide?”

“Was the quantity of recoverable mineral foreseeable from the information provided to the mining contractor at the time of tender?”

“Did blasting in a nearby quarry cause the cracking now seen at the subject property?”

“Would it have been possible to produce good quality aggregate from the in situ rock at this quarry?”

“Was a liquefaction failure in iron ore concentrate being carried in a bulk ore carrier responsible for its capsizing and sinking?”

“Could the adverse hydrogeological setting that gave rise to the spread of a pollution plume have been foreseen if the initial site investigation had been competently carried out?”

“Was mining overburden waste stripped by the contractor or by the mining company?”

Unlike, for example, providing an opinion on the medical condition of a patient, or forensic examination of financial accounts, questions such as these are ‘one-offs’, requiring bespoke investigation, often taking months or even years, before the expert can provide opinion evidence on the issues put to him or her. This is likely to include: forensic examination of documents; geological, geotechnical and/or hydrogeological modelling and calculations; and sometimes field and laboratory testing.

With years of accumulated experience of addressing questions like these, we feel well qualified to pass on some straightforward and practical advice to those identifying and instructing experts.

Selection of the right experts is critical, and this is not down to technical knowledge alone; just as knowledge of the law must be paired with skills and experience in advocacy for an effective barrister, technical knowledge must be paired with appropriate professional skills and experience in performing the roles and meeting the responsibilities of an expert witness. In our experience, the ability of an expert effectively to communicate his or her opinion to non-specialists in writing and orally is at least as important as technical or scientific experience (often more so). Money spent on instructing a technical expert who is unable or unwilling to make his or her opinions understood by the non-specialists who need to rely on them (lawyers, clients, jurors etc) is money risked (potentially even wasted), however eminent that expert may be, and however 'star struck' the client or instructing solicitor may be. His Honour Judge John Newey, speaking at a training event for technical expert witnesses in the 1980s, gave this advice: "If your expert report is not capable of being understood by an intelligent fourteen year old, try again"; this is simple yet powerful advice that has stood GWP's practising experts in good stead over many years and it is advice we would recommend lawyers to bear in mind when selecting and working with technical experts. This is not about dumbing down technical evidence, quite the contrary, as will be seen in the case study presented later in this paper.

GWP has been involved in cases where the personal credibility of the expert was a deciding factor in the judgement rather than technical arguments alone, and this aspect is also illustrated in the case study.

Choosing the right expert is only part of the challenge; to get the best from their experts, instructing solicitors need to provide appropriate support to the expert to allow him or her to most adequately prepare and present expert evidence.

We have set out below some advice for solicitors to consider when selecting and working with experts, from the initial approach to cross-examination, drawing on our experiences, both good and not so good.

Making the initial approach or how to identify the right expert

The first approach from a solicitor to an expert may be the result of a personal recommendation or arise from a trawl through directories by a junior assistant who may have a limited understanding of what kind of expert might be needed but has been set the task of identifying a shortlist of potential experts.

When making this first approach, consider the following:

- Is this expert's expertise applicable to the particular issue on which you need expert input?

- Does the expert understand what is required of an expert?
- Does the expert have any formal training or belong to organisations that support the professional development of experts?
- Does the expert have conflicts which would make s/he unsuitable?
- How much will the expert charge?
- What sort of experience or track record has this expert got as an expert witness in cases of this type?
- What sort of investigations will the expert need to do?
- Does the expert have technical and administrative backup in the office to carry out those investigations?
- Does the expert understand that the evidence will be theirs even if s/he gets colleagues involved working under his or her direction?
- Will the expert be genuinely independent and objective?

In order to find out these things you must give the expert sufficient information. Given sufficient information, an expert will be able to help you understand and frame the issues. This will also make it easier for them to determine whether they are the right expert for the job and, if not, give advice or recommendations of more suitable experts or additional expertise that may be needed on the team.

Instructing the expert

The key points to communicate to your expert are:

- What are the issues to be addressed?
- What stage has the dispute reached?
- What is the timetable?
- What is the expert expected to contribute in terms of 'deliverables'?
- Who will be settling the bill?
- What are the arrangements for submitting an invoice?
- Is there an upper limit on fees and what is the mechanism for review of the fee budget (or the Client's expectations) if this is later found to be insufficient to do the job properly? Consider a 2 or 3 stage instruction for example:

Stage 1

Please spend up to ** days (£**) reviewing the enclosed documents and provide an initial opinion on the following questions: (followed by a list of issues and questions arising out of what you think at this stage you need to prove in legal terms).

For each issue please confirm whether or not this is a matter within your expertise and, where possible, provide an outline of the information you would expect to see and the investigations you will need to carry out if this were to proceed to a tribunal requiring expert evidence (a good expert will tell you if a matter is not within his or her expertise and will often recommend a more suitable discipline and/or person).

Stage 2

Based on your preliminary opinion of the claim, please assist, in the role of expert advisor, in the preparation of the Prosecution or Defence case. We will agree a scope of work and a budget when the matters to be considered are clearer (based on Stage 1) (in other words “please help us to understand the claim and advise us as to technical matters within your expertise”).

Stage 3

As an outcome of Stages 1 and/or 2 if this case proceeds to a hearing, we expect to instruct you to prepare expert evidence. At that time, we will provide you with detailed instructions as to the issues to be addressed in your report and the required timing of your involvement. We appreciate that it will be necessary to re-visit the budget at that time.

Working with your expert – evaluating the strength of the case and the quality of the expert

During this phase opportunities exist to:

- Re-evaluate the technical strengths and weaknesses of your client’s case and identify any fatal flaws or serious weaknesses;
- Use the expert’s expertise and communication skills to help the client face up to weaknesses in his argument – and maybe modify his expectations of success or seek alternative ways to resolve the dispute;
- See how well the expert performs on paper, with the client, and the legal team.

Working with your expert – the experts report

Do:

- Make sure all relevant information is available – be guided by the expert. ‘Helpful’ attempts to limit the amount of documentation to be reviewed can backfire!
- Set realistic deadlines and be prepared to modify them if the expert’s investigation reveals or changes matters that are relevant to the conduct of the case, especially if the prospects of success are affected by new findings.
- Provide a clear list of issues to be covered in the report – usually best supplied as a set of questions, which the expert can often help you to frame.
- Remind the expert, however experienced, about mandatory elements such as setting out of instructions and qualifications and Statement of Truth.
- Read drafts carefully and provide suggestions for amendment and clarification. Your expert needs to be able to communicate his or her evidence to non-specialists like you. If you can’t follow what they have written, how can you be sure of the implications for your client’s case, and what risks are you running if the expert has not communicated clearly to the Court or other tribunal? Ask yourself whether the report passes the “intelligent 14 year old test”.
- Give the expert the opportunity to discuss their report with Counsel **before** it is finalised.

Don’t

- Write the report for the expert and expect them to sign it.

- Insist on behalf of a client that the report is modified to put their case in a better light. If a passage is unhelpful to your client’s case, you might consider modifying the instructions so that this issue is not covered in the report but **BEWARE**, your expert could still be asked about this in cross examination if it is within his or her area of expertise. Make your client aware of what your expert will say if asked and consider the risks associated with this.

Working with your expert – without prejudice meetings with other experts

Do:

- Agree a list of issues with your expert in advance.
- Make it clear that other issues (especially matters of law) are not to be part of the discussion.
- Help the expert by reviewing any joint document before it is issued. Suggest changes, don’t demand them.

Don’t:

- Insist on being present.
- Exclude your expert from the development of an agenda.
- Instruct your expert to be obstructive – the expert’s first duty is to the court by this stage.

Working with your expert – preparing for the hearing

In a technical case, Counsel needs to be able to understand the technical evidence on both sides. The expert has a valuable role to play working with Counsel as he or she plans cross examination. Keeping the expert away from Counsel is a false economy.

Working with your expert – the hearing

When evidence relevant to his/her expertise is being heard, the expert can perform a useful function assisting Counsel by providing explanation or prompts especially if unexpected responses are forthcoming. Hearing witnesses of fact and experts on the other side can significantly help an expert by reducing the scope for unexpected questioning. Unless it is a requirement of the Court, keeping an expert out of the proceedings until it is time for his or her evidence is likely to be a false economy.

When giving evidence, the expert is on his or her own – except for any re-examination by Counsel. You may think a poor performance at a hearing reflects badly on the expert alone – but should you have foreseen that this would happen? Could you have supported the expert better and made the requirements clearer? How did you let the expert get this far without anticipating how they would perform? How does poor expert performance reflect on you as an instructing solicitor?

How a case can turn on expert evidence and poor performance of experts – a case study

Sometimes cases turn on expert evidence. Although over 25 years old, one such example in which an expert from GWP appeared for the Claimants illustrates how poor performance of the Respondent’s experts was a crucial factor in the final decision against the Respondent.

The case: Langley & Ors v Coal Authority v The Coal Authority:

[2002] EWLands LCA_29_1996

After a landslide in the early 1990s in the 'Back Hills' area of Bolsover, several houses suffered damage, some to the extent that they had to be demolished. The owners of the damaged or demolished houses claimed that coal mining beneath the surface of their land (or beneath an area close to their land) had caused or contributed to the landslide in the 1990s. They claimed that they were entitled to compensation from the Coal Authority (the "Respondent") pursuant to the provisions of the Coal Mining Subsidence Act, 1991. The claims were brought in 1996. It was determined by the Lands Tribunal that all the cases should be heard at the same time and that, in the first instance, only issues of liability would be considered.

The Claimants' case was that there was a landslide in the 1930s in an area of the Back Hills which was, at that time largely undeveloped. They claimed that this landslide was caused by mining subsidence and that the later (1990s) landslide would not have occurred but for the 1930s landslide.

The Respondent's case was that the landslips were primarily the result of natural processes related to the evolution of the escarpment at Bolsover, and that the trigger mechanism for both slips was the rise in the water table following extreme rainfall.

The experts who appeared for the Claimants included Dr Alan Cobb from GWP (mining expert) and two experts on geology and landslips from Halcrow; Mr Siddle and Dr Jones. Two experts, Dr L and Mr M, appeared for the Plaintiff.

Issues to be resolved by the experts

1. What was the date or approximate date of the 1930s landslide? It was agreed between the parties that there had been such an event.
2. Was the failure in the 1930s a first-time failure? There was some suggestion in the evidence that apart from prehistoric landslips there had been failure in the area of the Back Hills in the 1920s.
3. Was the 1930s landslide shallow or deep seated?
4. What caused the 1930s landslide?
5. What caused the 1990s landslide?
6. Was the damage sustained by 71 New Station Road caused by the 1990s landslide?
7. The value and relevance of numerical analysis

Numerical analysis had been carried out by experts on both sides to model the historic and current situation in time and space as they saw it. This analysis was technically complex, and a key challenge for the experts in this case was the effective communication of what had been done and the meaning and significance of the results, to the advocates preparing and presenting the case, and to the judge.

Expert evidence and how the Judge Levy evaluated it

In his judgement, Judge Levy recorded:-

"As will be apparent from the previous paragraphs of this decision, almost all the evidence I heard was given by experts. Whilst they were in agreement with their opposite number on much, they disagreed on vital parts of the evidence of their opposite number. It is, therefore, necessary for me to evaluate the experts themselves as witnesses on whose evidence I can rely." The Judge's criticism of the defendant's experts reflects both injudicious choice of expert and lack of support or advice provided to the experts in carrying out the role of expert. There were two areas in which the experts' credibility was questioned by the Judge.

1. Was the report the work of the expert?

"When I first read Dr L's expert report I was struck by the number of times that the words "we" and "our" were used and I wondered if in fact I was reading a report by Dr L or one made by subordinates. In the course of his evidence Dr L said that he was more used to writing impersonal reports than the personal ones required of an expert witness."

These fundamental issues relating to the report that were identified by the Judge were entirely preventable if they had been properly checked by the instructing solicitor beforehand.

2. Was the expert fully aware of his duties to the court as an independent expert?

Mr M had previously been in the employment of the Defendant or its predecessor and questions were raised about his independence and his understanding of the responsibilities of expert witnesses, citing the guidance given by the courts in a decision of Mr Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Co* ("the Ikarian Reefer"). The judge concluded that:- "It may be that if his involvement with mining subsidence in Bolsover had been confined to the investigation he made and the memorandum he wrote in 1985, that could be seen to be the case; however, when an expert witness has actually addressed a meeting of opponents to a party by whom he is subsequently approached to give expert evidence, I find it difficult if not impossible to accept that he can truly be seen to be independent.

In the circumstances, in my judgment, it was inappropriate for him to give expert evidence for the Coal Board in this reference and I feel obliged to approach his evidence with caution."

The Client's case was badly damaged.

The weight to be given to the opinions of the experts In his decision the Judge concluded:-

"the criticisms which I have made of Mr M and Dr L are in my judgment substantial. In a case on which the decision must largely hinge on expert evidence, I have to make an assessment of the expert witnesses. I have in the previous paragraphs pointed to deficiencies in the evidence of each of them.

Apart from my belief that Mr M could not be seen to be an independent witness, I found him far less impressive as a witness in the witness box than was Dr Cobb. Not only was the latter more qualified than Mr M, but his knowledge on mining subsidence was greater.

At the end of the day I found Dr Cobb a most impressive witness and where his opinions differed from those given by his opponents, in my judgment it is appropriate to accept his views.

The many passages of his evidence on which Dr L was cross-examined most effectively, severely damaged his credibility as an expert witness. He did not seem to have mastered his brief, was less learned than Dr Jones and less knowledgeable than Mr Siddle.

Indeed, after observing the five expert witnesses for a number of days giving their evidence, and having read and re-read the transcripts of their evidence, I draw a firm conclusion that where their views differed I should place a higher value on the opinions of the experts called on behalf of the Claimants than those called on behalf of the Respondent.”

Conclusions

Make sure your expert understands his or her duties from the outset. In your instructions refer to and draw attention to the Guidance for the Instruction of Experts in civil claims (current version Civil Justice Council August 2014). Consider using a model form of engagement for experts and codes of guidance for experts and those instructing them.

Every expert has to start from somewhere – if you have an inexperienced but otherwise excellent expert, organise or recommend training or give clear help and guidance so that they avoid the pitfalls that reflect badly on them and, more importantly, could fatally damage your client’s case.

There is no excuse for not finding out you have the wrong expert before a hearing (and preferably before you identify them to the other side).

About GWP Consultants LLP

GWP has developed particular expertise in the assessment of methods of working and scheduling, geotechnical instability, diggability and blasting practice which are all common areas of dispute in surface mining operations. GWP has also developed additional specific expertise in the behaviour of quarried or processed materials during transportation on bulk carriers and in the hydrogeological characterization of sites relating to derogation claims, subsidence and contamination plumes and regularly advises on geological and hydrogeological conditions for major planning enquiries. In many cases, the Practice has assisted in attempts to avoid recourse to the courts.

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GWP Consultants LLP
Quarrying and Mining, Geotechnical & Hydrogeological Consultants

GWP Consultants LLP (GWP) is an independent Limited Liability Partnership based near Oxford, England, with over 50 years experience providing specialist geological, geotechnical, hydrogeological, hydrological and surveying expertise. These skills are applied to the quarrying, mining, waste management, water resources markets and also to infrastructure and governance projects throughout the UK and internationally.

Providing specialist expertise to quarry and mining industries, and geotechnical and hydrogeological advice to the international minerals and cement industry.

In our specialist areas we are able to provide objective, independent and reliable expert support for clients involved in mergers, acquisitions, valuations, floatations, feasibility studies, Public Inquiries and various forms of dispute resolution.

Our expert services are characterised by attention to detail, excellent communication skills and a collaborative style of working with other technical specialists, legal and financial professionals, regulators and the public.

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