

Expert Evidence and how to be a Good Witness

Craig Howell Williams QC

Barrister, Francis Taylor Building, Temple

Richard Honey*

Barrister, Francis Taylor Building, Temple

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Introduction

This article is of relevance to all professionals who are engaged in the planning appeal process. It will be of particular interest to planning and other experts who give evidence at planning inquiries. The article is set out broadly in two parts. First, it considers the role and duties of expert evidence by reference to relevant law and professional guidance. Secondly, it considers the practical aspects of giving evidence at planning inquiries.

Expert evidence—legal principles

What is expert evidence?

The general rule in the courts is that opinion evidence is inadmissible. It is said that an exception to this general rule is where a properly qualified expert is asked to express an opinion on a matter within his expertise on which the tribunal does not possess such expertise. The reasoning behind the admission of expert opinion evidence is to ensure that the tribunal can reach a fully informed decision.

The case of *Folkes v Chadd*¹ provides an early illustration of where the courts have accepted expert opinion evidence. In that case, it was alleged that the construction of a bank had caused the silting up of a harbour. Lord Mansfield noted that the issue was a question of opinion, an inference to be drawn from agreed facts, on which the court would receive the “opinions of men of science”.

More recent cases provide more helpful descriptions of expert evidence. The following test set out by King C.J. in the South Australian case of *R. v Bonython*² is often cited³:

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. The first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or

* Barristers, Francis Taylor Building, Temple, <http://www.ftb.eu.com>. This article is based on a presentation given to a chambers conference in 2010.

¹ *Folkes v Chadd* (1782) 3 Douglas 157, 99 E.R. 58.

² *R. v Bonython* (1984) SASR 45.

³ E.g. *Clarke (Executor of the Will of Francis Bacon) v Marlborough Fine Art (London) Limited* [2002] EWHC 11 (Ch).

experience, a special acquaintance with which of the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”

In *Barings plc (In Liquidation) v Coopers & Lybrand*,⁴ the judge concluded that what was admissible as expert opinion evidence was opinion evidence which was (para.45):

“capable of influencing the Court’s decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issue in the case justly. Such evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence.”

It can therefore be seen that expert opinion must be evidence which is necessary or valuable to the tribunal because it is expertise which the tribunal lacks. It will be immediately clear to anyone familiar with the planning appeal process in England and Wales that the Planning Inspectorate provides a professional, expert tribunal service. Inspectors are usually planners, or perhaps architects, engineers, surveyors and the like. They are experts in their own fields. Certainly on matters like mainstream planning evidence, the tribunal often possesses as much if not more expertise than many of the planning expert witnesses who appear before it. The same may be said of design and townscape evidence. It appears that much opinion evidence which is given to planning inquiries simply would not be allowed if court rules were applied.

Who may act as an expert witness?

As to who may act as an expert witness, the qualification used by the courts to consider whether expert opinion evidence should be admitted is whether “the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court”.⁵ The expert should have a “special acquaintance” with a relevant “body of knowledge or experience” so that his opinion is of assistance to the court.

Planning experts of course most frequently give evidence in planning inquiries, but they are also involved in other types of litigation from time-to-time. A good example is proceedings in the Lands Tribunal,⁶ where planning evidence may be necessary to determine the development potential of the land to be valued. Planning experts also give evidence in civil litigation, such as landlord and tenant proceedings or in relation to contracts relating to the acquisition of land. Occasionally, a planning expert might have to give evidence in a professional negligence case. Accordingly, planning experts do need to appreciate the wider context in which they may be required to give evidence.

An expert witness’ qualifications and experience should be set out in his report or proof of evidence. This is necessary not only to inform the tribunal of the witness’ expertise, but also to help demonstrate that the opinions set out in the document can be trusted and relied upon. An expert does not need to have acquired his expertise in a particular way before he can be regarded as an expert; provided he has the necessary expertise, it does not matter how that expertise was acquired.⁷ The questions to ask are: “Is he skilled? Has he an adequate knowledge?”⁸

⁴ *Barings plc (In Liquidation) v Coopers & Lybrand* [2001] Lloyds L.R. 85.

⁵ *R. v Bonython* [1984] SASR 45 per King C.J.

⁶ Now the Upper Tribunal (Lands Chamber).

⁷ *R. v Silverlock* [1894] 2 Q.B. 766.

⁸ Per Lord Russell of Killowen C.J. in *R. v Silverlock*.

What is the job of an expert witness?

The job to be performed by an expert was described as follows by May J. in *Larby v Thurgood*⁹:

“The task of an expert witness in litigation is to express an opinion within his expert competence on matters susceptible to such an opinion relevant to the litigation. He expresses that opinion on facts agreed, proved or to be proved by evidence. In addition to expressing his opinion, he may himself give factual evidence of matters of which he has first hand knowledge. . . . Once the primary facts on which his opinion is based have been proved by admissible evidence, an expert is entitled to draw on the work of others as part of the process of arriving at his conclusion.”

To be of any use at all, expert evidence must have a bearing on the issues which the tribunal has to resolve and must assist the tribunal in coming to a conclusion on those issues. To be helpful, the expert opinion evidence must be trustworthy. A tribunal, whether it is a planning inspector, the Lands Tribunal or a court, will only be prepared to accept and rely upon expert evidence if it finds it trustworthy. In part, this judgment will depend on the witness and his or her conduct during the hearing, and in particular under cross-examination. In part, this judgment will depend on the written report or proof of evidence, and how carefully, thoroughly and convincingly the opinion is set out, reasoned, justified and supported by evidence. It is necessary therefore to ensure that an expert works hard on both their written material and the oral presentation of it at the hearing.

The duties and responsibilities of an expert witness—law and guidance

The Civil Procedure Rules¹⁰ state that it is the duty of an expert to help the court on matters within his expertise, and that that duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid (CPR r.35.3). This encapsulates the duty which should apply to any expert, whichever tribunal they are appearing before. An expert must act objectively and not as an advocate for his client’s position. If an expert fails in either respect, a tribunal is likely to give that expert’s evidence very little weight. It will not be trustworthy.

In *Whitehouse v Jordan*,¹¹ Lord Wilberforce said (at 256–257):

“[I]t is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.”

There are other duties which apply to those performing the role of expert witness. In *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (“Ikarian Reefer”)*,¹² Cresswell J. summarised the position of expert witnesses as follows.

“The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 WLR 246 at p.256, per Lord Wilberforce).

⁹ *Larby v Thurgood* [1993] I.C.R. 66.

¹⁰ Reference should also be made Practice Direction 35.

¹¹ *Whitehouse v Jordan* [1981] 1 W.L.R. 246.

¹² *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (“Ikarian Reefer”)* [1993] 2 Lloyd’s Rep. 68.

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and *Re J*, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co. Ltd. and Others v Weldon and Others*, *The Times*, Nov. 9, 1990 per Lord Justice Staughton).
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

Particular points made in the CPR protocol for the instruction of experts, which forms an annex to CPR PR35, include:

- (i) experts must confine their opinions to matters which are material to the issues in the case, and must provide opinions only in relation to matters within their expertise (para.4.4);
- (ii) experts must state in their report if an opinion is qualified or provisional or if further information is required before a final opinion can be expressed (para.4.5); and
- (iii) experts must inform those instructing them if their opinions on any material issue change (para.4.6).

It is advised that an expert witness should have no interest in the outcome of the case and should not be appointed on the basis that their remuneration is linked to the evidence they give or the outcome of the case. In *R. (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No. 8)*,¹³ the Court of Appeal said (at para.73):

"To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement."

¹³ *R. (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] Q.B. 381.

Nothing is more likely to undermine the credibility of an expert's evidence than it becoming known to the tribunal that he has a financial interest in the outcome of the case.

Expert witnesses in planning

Advice was given to expert witnesses in relation to planning matters in the case *Burroughs Day v Bristol CC*¹⁴. In that case, the judge found that the expert witnesses had gone far beyond the range of what an expert witness is supposed to do in order to assist the tribunal. In particular, the judge criticised the experts for three reasons:

1. some of the expert witnesses were not independent, being employees or ex-employees of the authority;
2. some of the expert witnesses apparently thought that it was part of their role to act as supplementary advocates for their clients; and
3. each of the expert witnesses, who were architects or town planners, took it upon themselves to reach conclusions as to the interpretation of statutory provisions, which was neither admissible nor helpful.

In planning inquiries there is often, strictly speaking, little actual "expert" evidence given by planners. Much of the evidence is factual or relates to matters of judgment on which the inspector can readily decide. As already indicated, much of the evidence provides opinions on matters on which a planning inspector is himself an expert. That said, there are a great many issues which arise in planning cases where expert evidence is required. Examples include noise and vibration, air quality, traffic, ecology, water resources and flooding, archaeology, and the like. Whatever the subject matter (and whatever the tribunal), if they are to act in accordance with the duties set out in the *Ikarian Reefer* case, experts must: present independent evidence; not act as advocates; and not reach conclusions on statutory interpretation.

In this context, it should also be noted that an inspector is not bound to accept expert evidence, even when it is unchallenged.¹⁵

Expert witnesses employed by the parties

The courts take a particular approach to the use of experts who are employed by parties to litigation. This would apply in particular to officers employed by a local planning authority, which is a main party at a planning inquiry. Such officers may not only be planning officers, but may well be giving evidence on specialist, technical subjects such as environmental health, ecology, traffic and the like.

The fact of an expert being employed by a party to the case creates a conflict of interest, but that conflict does not of itself mean that the expert should not be allowed to give evidence. The key question is whether the expert's opinion, expressed in his evidence, is independent.

In *Toth v Jarman*,¹⁶ the Court of Appeal said (para.102):

"However, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is sufficient condition in itself. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced."

¹⁴ *Burroughs Day v Bristol CC* [1996] 1 P.L.R. 78

¹⁵ See *Kentucky Fried Chicken (GB) Ltd v SSE* (1977) 245 EG 839, *Westminster Renslade Ltd v SSE* [1983] J.P.L. 454, *Mason v SSE* [1984] J.P.L. 332.

¹⁶ *Toth v Jarman* [2006] EWCA Civ 1028

In *Field v Leeds CC*,¹⁷ a surveyor employed by the local authority was called to give expert evidence in a housing disrepair claim. The Court of Appeal accepted that “if an expert is properly qualified to give evidence, then the fact that he is employed by a local authority would not disqualify him from giving evidence” (paras 10–11). Lord Woolf M.R. said that if the local authority wished to use an employed expert then it had to show that he had “full knowledge of the requirements for an expert to give evidence” and was “fully familiar with the need for objectivity” (para.19). Waller L.J. said (para.26):

“The question whether someone should be able to give expert evidence should depend on whether, (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence.”

In another case, *R. (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No.8)*,¹⁸ Lord Philips M.R. said (para.70):

“It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management.”

In any case, where there is reason to doubt the independence of view of an expert witness because of a conflict of interest the situation should be disclosed to the tribunal. The Court of Appeal in *Toth* (para.112) said that:

“a party who is in the position of wanting to call an expert with a potential conflict of interest (other than of an obviously immaterial kind) should draw the attention of the court to the existence of the conflict of interest or possible conflict of interest at the earliest possible opportunity.”

The obligation to do this arose from the expert’s duty to the tribunal, so that the tribunal was able to decide whether to act in reliance upon that expert’s opinion (para.113).

The law was summarised by Nelson J. in *Armchair Passenger Transport v Helical Bar*¹⁹ as follows:

- (i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.
- ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.
- iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.
- iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.

¹⁷ *Field v Leeds CC* (2000) 17 EG 165

¹⁸ *R. (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No.8)* [2003] Q.B. 381.

¹⁹ *Armchair Passenger Transport v Helical Bar* [2003] EWHC 367, QB.

- v) The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.
- vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.
- vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence."

Professional guidance

It should go without saying that professionals appearing as expert witnesses should comply with the professional guidance issued by their relevant institution. The RICS has both a mandatory practice statement and an advisory guidance note: *Surveyors Acting as Expert Witnesses* (3rd edition). The RICS document sets out explicit standards and requirements which apply to chartered surveyors when giving evidence before planning inquiries.

The RICS practice statement and guidance note apply to all surveyors giving evidence in planning inquiries and hearings. It requires that the surveyor's primary duty will be to the tribunal. The surveyor's evidence must be independent, unbiased and impartial, and cover all relevant matters, whether or not they favour the surveyor's client. The surveyor's report must state the substance of all instructions given to the surveyor, whether written or oral. If a range of opinion could be said to apply, the surveyor should set out that range and then give reasons for adopting the particular opinion. The report should include a statement of truth and various declarations as to compliance with the duties of an expert, including as to conflicts of interest and conditional fee agreements.

The RTPI Code of Professional Conduct (last amended in 2007)²⁰ contains general provisions which require its members to act with honesty and integrity and to "fearlessly and impartially exercise their independent professional judgement to the best of their skill and understanding". It also requires that members do not undertake reports which are contrary to their own bona fide professional opinions. However, it does not deal expressly with the role of planners acting as "expert" witnesses. The RTPI Practice Advice Note 4 *Chartered town planners at inquiries* (1989, but since updated)²¹ advises that when giving evidence of "a professional opinion, it must be the planner's own professional opinion if it is to carry weight as expert evidence". However, the Advice Note does not expressly recognise that the planner appearing as an expert owes any duty to the tribunal.

The Advice Note says (emphasis added):

"Care must be taken to avoid giving the impression that any statement made or views expressed at the inquiry represent a planner's own view if these are contrary to his or her bona fide professional opinion. This must be borne in mind in the preparation of any proof of evidence. *It does not mean that the planner should volunteer the information that the case being supported is at variance with his/her own professional opinion.* Nevertheless, if challenged on the point, the planner must be prepared to declare an opinion."

"If, nonetheless, a planning officer is called in such circumstances, the person conducting the case and the employing authority must be prepared to accept the consequences of such a *revelation, if it is made.*"

²⁰ <http://www.rtpi.org.uk/download/154/Code-of-Professional-Conduct-2007.pdf> [Accessed August 3, 2010.]

²¹ <http://www.rtpi.org.uk/download/354/PAN-04-planners-at-inquiries.pdf> [Accessed August 3, 2010.]

The advice that a planner acting as an expert witness need not inform the tribunal of his or her own opinion is of some concern. It is not considered that it is a tenable position for an expert witness to adopt. For any expert giving evidence in a planning inquiry, it would be advisable to seek to follow the RICS guidance which is more comprehensive and, in this particular respect, is more in line with the duties summarised in the *Ikarinan Reefer* case.

In addition to the professional institutions, there are organisations which provide training and support for expert witnesses and which have their own codes of conduct.²²

The duties—further guidance in the context of planning inquiries

In *Burroughs Day v Bristol CC*, Mr Richard Southwell Q.C. (sitting as a deputy judge of the Queen's Bench Division) referred to the summary of duties for expert witnesses as set out in the *Ikarinan Reefer* case and emphasised that "it applies to all legal proceedings". Whilst the duties and responsibilities in the summary are set in the High Court context (*Ikarinan Reefer* was a commercial court action), there is no convincing reason upon which to conclude that they should not be applied to the context of other tribunals, including planning inquiries. That having been said, the duties cannot be applied without some recognition of the particular nature of planning inquiries.

First, *expert evidence must be the independent product of the witness*. Expert evidence should be unbiased and uninfluenced by others. An expert witness should present to the inspector his own views, not those of his client or employer if they are different. In such circumstances, a witness should explain to his client or employer that he will not be able to provide expert evidence in support of the case. For obvious reasons, he should do this as soon as possible.

A local planning authority is often faced with a problem in this respect. It is frequently the case that a planning committee rejects the professional advice of officers and refuses planning permission. Where this happens, the officer responsible for the report to committee should not bow to any pressure and present evidence in support of the reasons for refusal where this means that he would be representing the views of the committee as if they were his own. There is nothing to prevent him giving evidence, but it would not assist the planning authority's case if he had to acknowledge, as he inevitably would, that he does not agree with the planning committee's conclusions or reasons for reaching those conclusions. The right approach should be for the planning authority to consider an alternative witness, either an officer or a consultant, who can genuinely provide a professional view that accords with that of the planning committee. The other option is to call a member of the planning committee.

Secondly, *the duty of an expert is to assist the tribunal in relation to matters within his expertise*. This is an overriding duty. In particular, an expert witness should not assume the role of an advocate. The role of an expert witness is entirely different from that of an advocate. Whilst both owe a duty to the tribunal, an advocate is "a gun for hire" who does not give evidence. The expert's role is to assist the tribunal by giving evidence, his own independent opinion evidence. The two roles should remain clearly separate.

It is sometimes the case at planning inquiries that an officer presents the case on behalf of the local planning authority. There is nothing wrong with this per se, but the officer should not also purport to give expert evidence. There is a danger for confusion of the roles at all public inquiries where a planning consultant or local planning officer wishes to present the case on behalf of the local, but the danger is most marked at hearings (such as examinations in public), where the process is informal and more inquisitorial.

Thirdly, *an expert witness must state all the material facts or assumptions*. In particular, an expert must refer to material facts that could detract from his opinion. In practice, in the field of planning, this means that witnesses should inform the inspector of all the facts and assumptions to which he has had regard in

²² For example, the Academy of Experts and the Expert Witness Institute.

preparing his evidence, including those which cut across his argument. This is a readily understandable obligation. However, although the facts and assumptions can easily be noted in a witness' proof, there are likely to be occasions where a witness is in doubt as to need to divulge information. For example, a witness might question the need to refer to a planning decision in which an inspector has reached a different view on a particular point. It is suggested that there should be no difficulty in this regard. If a previous decision is relevant and might influence the inspector, it ought to be referred to. It would in any event be foolish for a witness take the risk and not refer to an unhelpful decision in his evidence. The witness's credibility would be undermined if the matter was raised by an opposing advocate in cross-examination. It is much better for a witness to acknowledge material which tends against the conclusion that he has reached, but then to explain why the view he adopts is the better view having regard to all the relevant material.

Fourthly, *an expert witness must make it clear when a particular question or issue falls outside his expertise*. Planning witnesses are not lawyers and the law is not within their expertise. That is not to say that planning experts are not permitted to express a view on the application of the law to the facts. That may be a critical part of their evidence. But they should not claim an expert opinion in the law itself. Indeed, they should state clearly that the matter is outside their expertise. It is best for an expert to state that they are advised that the law is whatever it is, and then set out the legal position in summary, before applying it. It will then be for the advocate to make submissions as to whether that legal position is correct.

Fifthly, *an expert witness must state if his opinion is based on insufficient information, incomplete or preliminary*. This obligation requires little explanation. It will nearly always be obvious to a witness if his opinion is not a finalised one or is one that is in some way qualified. The principle behind the duty is that an expert opinion must be properly understood.

Sixthly, *if an expert witness, after the exchange of evidence, changes his mind on a material matter he must communicate this to the other side without delay*. This obligation also requires little explanation. There is ample opportunity in the planning appeals procedure for witnesses to discuss and exchange views and information. There is nothing to stop experts discussing the case before proofs have to be finalised and they would be well-advised to do this, so as to minimise the need later to change their mind once the opposition's evidence is available. Statements of common ground are aimed at ensuring that matters are agreed as far as possible in advance of an inquiry. Even after exchange of proofs (and after the statement of common ground has been signed), there is normally time for witnesses to confirm agreement on outstanding issues and indicate where there has been a change in position.

Seventhly, *an expert witness must disclose documents to which he makes reference*. This duty is similar to the last in as much as it is linked with the duty that the expert owes the tribunal and directed to ensure that the expert does not unfairly prejudice the other side.

The consequences of non-compliance

The duties and responsibilities that are set out in the *Ikarian Reefer* case apply to all experts and should be complied with in all proceedings. The consequence of non-compliance is that the tribunal may disregard the evidence given or place little weight upon it. A recent case in the Magistrates Court illustrates the danger. The case related to an action under s.82 of the Environmental Protection Act 1990 (a nuisance case), but the facts of the case are unimportant. The warning is clear from the District Judge's comments on the evidence given by one of the expert witnesses:

"I also find that as an expert Mr X could and should have approached the Reids through his solicitors in order to gain access to their house/garden in order to conduct the same type of experiments that Mr. Y undertook. I do not accept that he would have been refused entry—the Court would have drawn an adverse inference on that refusal.

I find for the further reasons set out below that Mr. X's evidence was not reliable:

- He was unaware of his duty as an expert; until Counsel for the Prosecution read out his duty in open court part the way through the trial. Pausing here, I find this admission astonishing, and leads me to the following further findings.
- His report contained assertions as to his Solicitors' commitment to the environment (see paragraph 66 above) that he had no basis for putting in his report as he admitted to me in evidence.
- He accepted there was a reference to a 'factory' that made no sense at all, given one was clearly dealing with a dwelling.
- He accepted that, (see paragraph 67 above) there was a recommendation to implement noise control measures, yet this did not 'square' with the assertion at his paragraph 1.5
- He accepted the 'telephone note' suggested an improper way of dealing with another's expert's report.

All those above findings allow me to not feel able to rely upon the findings of Mr. X."

Three golden rules about giving evidence

What are the "golden rules" for being a successful witness? There are three basic tenets for being a good witness: be prepared, be clear and be trusted. They derive, in spirit, from the *Ikarian Reefer* principles. Adherence to these fundamental rules will greatly enhance the performance of a professional witness. That is not to say that compliance will automatically make a good witness. The fact is that there are no set rules that can guarantee success. A witness becomes a good witness by adhering to some basic principles, but also by developing his idiosyncratic skill with experience.

Be prepared

Preparation for an inquiry should be thorough. The facts should be mastered, the research complete and the arguments well-rehearsed. It is in fact a pre-requisite for the successful witness to be familiar with the issues and fully informed as to all matters that touch upon them.

This rule extends to the need to prepare the relevant documentation in advance of the inquiry. Witnesses often appear to lose their way whilst giving evidence because they are not in command of the documents. A surprising number of witnesses fail even to bring to the inquiry all the relevant documents. A good witness will have ordered his documents and flagged or marked them for easy reference.

A witness who is not prepared will falter under questioning and be of little assistance to the inspector. A witness who is prepared can be confident and is more likely to be persuasive.

Be clear

It must be remembered that an expert witness has a duty to assist the tribunal. This means that a witness' evidence must be easily understood. Not only must a witness speak clearly, but he must also convey his thoughts in a way that the inspector can consider them quickly and make a note of them. A failure to communicate clearly will result in a failure to assist the inspector; it will result in a failure to persuade him of the case that is being urged upon him.

Be trusted

This is perhaps the most important of all the golden rules. An untrustworthy or unreliable witness is of no help to the inspector and of no use to his client since it is likely that the inspector will place little weight on his opinion. If the inspector trusts a witness, he will be more inclined to accept the views of that witness.

How to earn the trust of the inspector? A witness must, as already indicated, be prepared and he must be clear in the presentation of his evidence. That will go some way to earning the trust of the inspector. But more than this, a good witness must be full, frank and honest. In this regard, he must, for example, answer questions directly and without obfuscation.

The role of counsel

It is important that an expert witness fully understands the role of counsel in so far as it relates to the evidence of the expert witness. The Planning and Environment Bar Association (PEBA) has produced a guidance note entitled “Bar Council Guidance on Witness Preparation” which explains the principles that should be borne in mind with particular reference to the role of counsel in the development of a witness’s written evidence.²³ The guidance emphasises the distinction between legitimate witness preparation and impermissible coaching. Coaching is where it is suggested what the witness should say, or how he or she should express himself in the witness box. This is prohibited. A barrister “must not rehearse, practise or coach a witness in relation to his evidence”.

In relation to all types of witness statements it states:

“It is clearly critical that any witness statement should be the product of the witness, and not of the barrister. Therefore, paragraph 13 of the GWP²⁴ states that in settling witness statements, great care must be taken to avoid any suggestion

- that the evidence in the witness statement has been manufactured by the legal representatives
- that the witness has been influenced to alter the evidence which he or she would otherwise have given.”

With specific reference to experts, the guidance quotes from the Bar Council Guidance on Witness Preparation:

“It goes on to say that barristers have a proper and important role in advising experts as to (1) the issues which they should address in their report; (2) the form of their report and any matters which are required...to be included within it; and (3) any opinions and comments which should not be included as a matter of law”. Paragraph 15 goes on to stress that reports should be the “independent product of the expert” and although a barrister may discuss or annotate the report, he or she should not seek to draft any part of an expert’s report.”

Advocates should not speak to their witnesses once cross-examination has begun and there should be no contact between the witness and other members of the team from that time. These prohibitions are designed to ensure that the witness maintains, and is seen to maintain, his independence throughout his oral evidence.

The proof of evidence

This not the appropriate place to consider in detail how to write a proof of evidence. The matter certainly warrants a separate article. However, there are some simple, but important, guidance points that fall properly within the scope of this article and are related in one way or another to the *Ikarian Reefer* duties. Of course, each proof will be different and the content will depend on the nature of the issues between the parties. The following brief guidance is therefore intended to be of general application.²⁵

²³ www.peba.info

²⁴ The Bar Council Guidance on Witness Preparation.

²⁵ See also PINS Good Practice Advice Note 07/2009.

Make time

Never underestimate the time it takes to produce a good proof of evidence. The task is time-consuming, but the effort worthwhile. An expert witness should be prepared and his evidence should be well researched and complete.

Be clear

As has already been said, the best witnesses are those who present their case in a clear and easily understandable way. In this respect, the text must be written in plain English as far as is possible. Technical terms should be explained, perhaps in a glossary.

Identify the issues

Inspectors normally begin inquiries by setting out the issues as they appear at that stage of the proceedings. They do this having regard to the evidence that they have read, including the proofs of evidence that have been exchanged. It is therefore of great help to the inspector if a witness defines the main issues, as they are relevant to his particular evidence, in concise terms in his proof. Great care should be taken in considering the issues—their formulation may well be significant.

Present a clear argument

Be clear. Clarity of argument, as well as concision in expression, is obviously important. In this respect, it may be of use at an early stage in the preparation of a case to draft an outline of the argument on a single A4 page and circulate this to other members of the team for comment. This will be useful, not only for other members of the team, but for the witness himself, who can take any comments into account and review the argument as necessary. Importantly, the evidence in the submitted proof must be that of the expert witness, not that of another member of the team, although there is nothing wrong with an expert seeking guidance where it is needed. Indeed, such an approach is to be encouraged, if the result is to enhance the informed and *independent* evidence that is to be given to assist the inspector. Guidance will help ensure that an expert's report expresses the evidence in a clear, articulated and complete manner. Planning experts rarely work in a vacuum and often have to rely on conclusions reached by other experts working for the same party, so it is vital that experts discuss how their opinions inter-relate and affect each other.

Be consistent with views expressed elsewhere

Whilst an expert is entitled to change his opinion on matters between cases, there would have to be a good reason for this. A prudent witness will therefore check his evidence against similar cases so that he is not caught out at inquiry. Opponents may well have access to proofs of evidence that have been submitted elsewhere.

Anticipate points

All points that affect the evidence to be given by the expert witness must be addressed in his proof. In particular, a witness must not seek to avoid points that materially detract from his opinion. A witness should not omit reference to such a point and not take the risk that it will not be raised in cross-examination.

Not only in so doing will a witness be in breach of the duties of an expert witness, but his evidence will be discredited as a result. There can be no excuse for failing to address important points since they will have been raised in the application documents or the pre-inquiry statements.

Write as short proof as possible and employ a simple and logical structure

The proof must be as short as possible, and every effort should be made to agree matters and set them out in the statement of common ground. A proof should not set out the text of any relevant development plan policies in full. These can be attached to the statement of common ground or included in appendices (or they can become an agreed core document). The text of national policy need not be set out or separately provided. Inspectors will have their own copies of these. Similarly, the conclusions must be short; they must not rehearse the evidence that has been set out in the proof and they must not contain new points. Inspectors are understandably ungrateful for unduly long proofs. There is no crime in brevity and there will perhaps be commendation for a concise proof.

A good structure to a proof is also very important. It should be remembered that an inspector will be considering the evidence at home, possibly some time after the close of the inquiry. He will have read the evidence through before and during the inquiry, but he will need to know where to look in a proof for a particular point. He can only do this easily if the proof is structured in a sensible way. The proof must not contain repetition, nor must a point be addressed in different places and it should be obvious where a particular point is discussed. The proof must be paginated and contain a contents page. The appendices must also be paginated and each appendix tabbed properly. There is nothing more irritating to an inspector than unpaginated and unseparated appendices. It makes his task all the more difficult.

Provide references

It is essential that all sources are properly referenced (with page and paragraph numbers provided). Appendices can include copies (or copy extracts) of the most relevant documents. Footnotes can be used for those that are not of such importance. A bibliography can also be used and, in technical matters, a glossary can be valuable.

Provide a proper summary

Some witnesses do not understand the obligation to provide summaries of their proofs. Either they produce text which merely informs the reader where particular matters are covered in the main proof, or they simply reproduce some parts of the text and not others. A summary is a shortened version of the proof which sets out in brief form the main points of the evidence. There should be no new points raised. It is also important, in order to assist the inspector, and others, to use the same structure as that employed in the proof.

Evidence in chief

Evidence in chief is the evidence given by a witness for the party who has called him. The giving of evidence in chief is sometimes thought by witness to be of limited value. Witnesses sometimes believe that once their proof of evidence has been submitted there is little more to be done in preparation for the inquiry and no purpose in repeating points that are made in the proof which the inspector will have read. This is a mistaken view, which fails to understand the opportunity that arises to secure the attention, and possibly win the mind, of the inspector. A good witness will make time to prepare for an inquiry, including consideration of how best to give evidence in chief. Set out below are some suggestions that may help.

Revision and preparedness

A planning inquiry is not an examination. Giving evidence is not a test of memory. However, revision is as necessary for an inquiry as it is for an exam. All the important documents should be reviewed and all the arguments reconsidered. Even past correspondence should be reviewed. Letters often become relevant late in the day and cross-examination may not be limited to documents that are before the inquiry.

There is another similarity to the exercise of preparation for exams. A witness should make time for revision and not leave it till the last minute. It is also vital for a witness to have a good night's sleep. There is no purpose in working late into the night if the result is that a witness is weary and slow-of-thought when giving evidence the next day.

A witness should also ensure that all his documents are in order and flagged up for easy reference. He should also ensure that he has pen and paper and any other stationery or equipment that may be needed. It is also of use for a witness to visit the inquiry venue beforehand and familiarise himself with the layout of the inquiry.

Route map

Summary proofs are provided in part to assist in the giving of evidence in chief. Obviously, they are much shorter than the original proof and they can be read or referred to in order to save inquiry time. However, the inspector will probably have read the summaries and on their own they rarely make for a stimulating presentation. It is much better to consider a fresh approach in order to grab the inspector's attention. With this in mind, it is useful in advance of the inquiry to discuss the presentation of evidence in chief with the advocate and decide upon a suitable structure which will cover all the issues that need to be considered having regard to the evidence that has been exchanged (and the statement of common ground). With this in mind, a "route map" can be devised, perhaps based on the outline of the evidence mentioned earlier. This is a single A4 page which sets out a logical order of issues and points that the witness wishes to speak about. The document, which should be fully referenced to the proof of evidence and other inquiry documents, can even be offered to the inspector to assist him in following the evidence. In some circumstances, where it is necessary to provide additional text, "speaking notes" can be used. These are useful where there has been an exchange of evidence shortly before the inquiry or where there is for some other reason a need to update matters in the light of evidence already given to the inquiry. These documents can save inquiry time by helping the inspector with note-keeping, but they should not contain new evidence that would cause prejudice to other parties to the inquiry. Again, all such documents should be fully referenced.

Responses to points raised

It is vital that a witness responds to all material points that have been raised in his evidence in chief. This is clearly in accordance with the duties in the *Ikarian Reefer* case. Indeed, an inspector might well conclude that a witness who fails to address material points is not reliable. He may even conclude that there is a deliberate attempt to avoid dealing with the point. Similarly, it is inappropriate to reserve a point in the belief that it is tactically advantageous to do so, perhaps waiting to raise it by surprise in cross-examination. There may well be no opportunity to make the point in cross-examination — the witness has little control over the matters that are discussed in cross-examination—and if a matter is not raised in cross-examination it cannot be raised in re-examination.

Engaging with the inspector

Although an inspector will have read the proofs before the inquiry, and therefore will be familiar with the substance of the evidence, examination-in-chief gives an expert the opportunity to look the inspector in the eyes and explain and summarise their opinions in direct and “human” terms. This can be far more powerful and persuasive than any number of written words. It is important therefore to prepare to explain your opinions — certainly on the most important and contentious points—to the inspector in oral evidence in a way which is pithy, clear and attractive.

Cross-examination

Set out below are some tips on dealing with cross-examination directed to the aspiring witness.

Address the inspector

Although an advocate will be asking the questions, direct your answers to the inspector. The inspector is the most important person in the room. Your duty, as an expert witness, is to assist him in relation to the matters within your expertise. Watch the inspector. Ensure that he is listening. Ensure that he understands your answers. Engage with him. Speak slowly and clearly so that he can make a good note of your evidence. Watch the inspector’s pen.

Listen carefully

If you do not hear the question properly, ask for it to be repeated. If the question is not clear, ask for clarity. If the question is a long one, consider each part of it. In this circumstance, it may help to make notes, but only do this when it is absolutely necessary as otherwise it will distract you from listening. If you do not understand the question, ask for it to be re-phrased. Do not be afraid to say when you do not understand. However, never use it as a ploy to gain more time to think of an answer.

Think before you speak

Once you have heard and understood the question, consider your answer carefully. Do not begin to speak until you know what your answer is. Do not rush to answer. Ill-considered answers do not assist the inspector and will not advance your client’s case.

Answer the question

The purpose of cross-examination is to answer the questions that are put to you by the opposing advocate. It is not intended as another opportunity for you to state your case. Do not speak around the question. Do not, unless it is necessary to do so, employ different words from those that are used in the question. Answer it, so far as is possible, in the terms in which it is put. A failure to answer the question is inconsistent with your duty as an expert witness. Moreover, any attempt to avoid the question will be obvious. An opposing advocate will make hay of your failure. It will irritate the inspector and not advance your client’s case. At worst, it will undermine your credibility and your evidence will be less likely to be accepted.

Of course, there are some answers that a witness may feel reluctant to give since they detract from the case that is being promoted. But the right approach in such a circumstance is not to refuse to answer the question, but to answer it directly, and then explain or justify that answer. The best way to do this is to adopt the well tried, and much commended, tactic of saying: “yes, but ...” or “no, but ...”. If you feel you need to explain or qualify an answer which would be incomplete or misleading if answered in simple

“yes” or “no” terms, make sure that you do so. Occasionally a witness will need to stand up to a barrister, or even appeal to the inspector, in order to have time properly to explain their position. At the least this will make it clear to your barrister that a question needs to be asked in re-examination.

A witness should be ready to admit the obvious weaknesses in his case. A good witness will have prepared for this and designed his response so that the inspector fully understands the reasons for his position.

Do not give unnecessarily long answers. The inspector will not be able to take a good note and may become irritated. Where it is necessary to give a long answer, it will help the inspector to have structured answers. For example, say: “there are three points that I would like to make in answer to that question. First, ...”.

Do not, without good reason, repeat answers. An answer that includes a major point can be repeated, but only once. After that the right approach is to turn to the inspector and say: “I will not repeat my answer again. I hope that you have a note of it.”

Keep to your expertise

Remember that you are an expert in a particular field. You should therefore have the advantage over the advocate cross-examining you. Do not stray outside your expertise. Stay on strong ground—on ground where you have the knowledge and expertise. Keeping to your expertise will allow you to remain confident in what you say. You should be determined. Be determined and do not pull your punches.

Stay calm

Whatever the question, whatever the answer, stay calm. A witness who loses his temper is less able to think clearly, and will not appear to be a good professional. If you need to refer to a document, say so and take time to find the correct reference. If you need assistance, say so. If you are in need of a break, ask for one. A good witness will also be polite. This does not mean being polite just to the inspector, although this is obviously important. But be polite to everyone—to the opposing advocate and to third parties.

Beware of the advocate who

Every advocate has a different style. Most advocates are fair. Good advocates will have prepared their cross-examination carefully. Their questions are not intended as conversation or debate and are normally designed to advance their own case. Here are some hints to help the novice witness deal with questions from tricky advocates.

- Beware of the advocate who purports to summarise your case. Some advocates will assert by way of a preamble to a question: “your case is ...” (or use some such words). Listen carefully to his formulation—it may not be correct or accurate.
- Beware of the advocate who begins a question with a long preamble. Do not assume that the preamble is unimportant or uncontentious—it may not be.
- Beware of the advocate who begins a question with the phrase: “assuming that ...” (or some such words). Listen carefully to the hypothesis—you may wish to disagree with it.
- Beware of the advocate who says: “I will come to that ...” (or uses some such words). Make a note of this—he may not return to the point.
- Beware of the advocate who purports to quote a document. If the reference is important, ask to be taken to the document. It may be that his quotation is not entirely accurate or that there is some other relevant text which the inspector ought also to bear in mind.

- Beware of the advocate who misinterprets your answer. If this is done, take the opportunity to correct him.
- Beware of the advocate who interrupts your answers. If an advocate does this, insist (politely) that you finish your answer.

Re-examination

The advice here is as follows. It might be very tempting to think that once cross-examination is over, it is time to relax. After all, it might be thought, there can be no more unfriendly questions. But there would be great danger in this approach. Whilst it is true that questions in re-examination are intended as “friendly fire”, the hard work is not over and the need to stay focused remains. Re-examination is not an easy ride. An expert witness should remember that he is still giving evidence. The inspector is still listening and noting the answers. He should also remember that in re-examination the advocate is not permitted to ask leading questions (i.e. questions that give or suggest the answer); he must ask “open” questions. Therefore a witness must listen carefully, very carefully. Expensive mistakes can be made in re-examination. It is a surprisingly frequent occurrence that in seeking to overcome a slip in cross-examination, an advocate and witness will together compound, or at least draw attention to, that slip by raising it in re-examination. When a witness gives the opposite answer to that expected by his barrister it will sometimes be painfully apparent to everyone in the inquiry room except the witness.

The inspector’s questions

Here again, the temptation might be to relax. But the expert witness must do nothing of the sort. He must stay focused. An inspector may ask a question that is genuinely not significant, for example one seeking confirmation of a reference. But he may also ask a question that is important or even fundamental to the case. A witness should feel free to disagree with an inspector’s question. Witnesses often agree with propositions put in questions from an inspector, whether they are right or not. Inspectors can be far more effective at securing concessions from witnesses than even the best advocates at the Bar. Therefore the expert witness must stay focused. He must not relax, let alone switch off.

