

# **The Chartered Surveyor as Expert Witness**

## **A Guide to Best Practice**

### **Preamble**

This guide seeks to provide assistance to the Chartered Surveyor instructed as an Expert Witness. SCS members are expected to follow the recommendations provided herein. This guide is effective from 1<sup>st</sup> October 2009.

It is drawn heavily from the RICS Practice Statement and Guidance Notes “Chartered Surveyors Acting as Expert Witnesses” and it is strongly recommended that members familiarise themselves with that document. Members should also be aware that the Law Reform Commission has published a consultation paper on Expert Evidence and should consult this also.

For the purposes of this document, the generic expression ‘tribunal’ means any body whose function it is to determine disputes. This therefore includes:

- Courts and tribunals (including the Valuation Tribunal);
- Arbitrations tribunals (including hearings before the Property Arbitrator); and
- Independent Experts.

### **Principal message**

As a surveyor actively involved in a dispute that may come before a tribunal, you may find yourself carrying out one or more roles, including that of an expert witness. Your primary duty as an expert witness is not to a client but to the tribunal. Your primary duty to the tribunal is to ensure that the expert evidence provided by you:

- **must be, and must be seen to be, your independent and unbiased product, and fall within your expertise, experience and knowledge;**
- **must state the main facts and assumptions it is based upon, and not omit material facts that might be relevant to your conclusions; and**
- **must be impartial and uninfluenced by those instructing or paying you to give the evidence.**

**It is imperative that you do not stray from the duties of an expert witness by acting in a partial, misleading or untruthful manner. In those instances when you may adopt a dual role of surveyor-advocate and expert witness, it is also imperative that you differentiate at all times clearly between the two roles (see Section 8).**

## **1 Application of guide**

**1.1** This publication applies to any SCS member (usually described hereafter as ‘the expert witness surveyor’ or ‘you’) who provides expert evidence, whether oral or written, to the proceedings of any tribunal in the Republic of Ireland, except for criminal proceedings.

**1.2** This publication does not apply to you when acting in any capacity other than as an expert witness (for example, in the capacity of a witness of fact). In cases where you are using your professional experience, knowledge and expertise in the role of surveyor-advocate, *The Chartered Surveyor as advocate*: SCS publication will apply.

**1.3** You give expert evidence when you draw upon your professional experience, knowledge and expertise to provide evidence to a tribunal, such evidence being distinct from:

- (a) advice not given for the purpose of a tribunal’s proceedings;
- (b) evidence of fact; and
- (c) advocacy of a case.

**1.4** Since this publication only applies to the provision of expert evidence by you when appointed as an expert witness, it does not apply for the purpose of assisting your client to decide whether to initiate or defend proceedings to be heard by a tribunal. However, where you

are giving advice in writing to your client and consider that you may be required to give expert evidence in such proceedings, you must advise your client in writing if your advice or investigations would fall short of that necessary to enable expert evidence complying with this publication to be provided.

## **2 Duty in providing expert evidence**

**2.1** Your overriding duty as an expert witness surveyor is to the tribunal to whom the expert evidence is given. This duty overrides the contractual duty to your client. The duty to the tribunal is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour your client. This applies irrespective of whether or not the evidence is given either on oath or affirmation. Special care must be taken to ensure that expert evidence is not biased towards those who are responsible for instructing or paying you. The duty endures for the whole assignment. Opinions should not be exaggerated or seek to obscure alternative views or other schools of thought, but should instead recognise and, where appropriate, address them.

**2.2** Where, for any reason, you are unable to comply with any order or direction of the tribunal you should, as soon as practicable:

(a) prepare a written record of the reason for such non-compliance; and

(b) give copies of that record to your client and to the tribunal.

**2.3** The duty to the tribunal set out at 2.1 applies whether your expert evidence is given orally or in writing.

**2.4** As an expert witness surveyor you must be able to show that you have full knowledge of the duties relating to the role of an expert witness when giving evidence.

**2.5** You are entitled to accept instructions from your employer to give expert evidence on behalf of that employer. Prior to accepting such instructions, you must satisfy yourself that your employer understands that your primary duty in giving evidence is to the tribunal and that this may mean that your evidence will conflict with your employer's view of the matter or the way in which your employer would prefer to see matters put.

**2.6** Where you are acting – or have previously acted – for a party on a matter (in the course of, for instance, negotiations) and the matter requires, or may in the future require, the giving of expert evidence, you must throughout consider, and then decide, whether you can fully satisfy the overriding duty to the tribunal to provide evidence that is truthful, independent, impartial, and complete as to coverage of relevant matters.

**2.7** As an expert witness surveyor you must not malign the professional competence of another expert witness. If you feel that expressing doubts about the competence of another expert witness is both justified and necessary in order for you to present a full picture to the tribunal, you may bring to its attention where you consider the experience, knowledge and expertise of another expert witness is lacking, inappropriate or exaggerated, or where you consider evidence is biased, explaining why. Comments should be focused on the facts, interpretation of data and analysis of opinion.

### **3 Acting as an expert witness, and instructions**

**3.1** You must only act as an expert witness and give expert evidence where you have:

- (a) the ability to act impartially in the assignment;
- (b) the experience, knowledge and expertise appropriate for the assignment; and
- (c) the resources to complete the assignment within the required timescales and to the required standard.

**3.2** If you have any doubt as to whether you should accept instructions to act as an expert witness, you must advise your prospective client accordingly. If you consider that the tribunal might attach less or no weight to your evidence as a result of particular circumstances, you have a duty to advise your prospective client accordingly.

**3.3** Prior to accepting instructions to act as an expert witness, you should:

- (a) advise your prospective client in writing of the nature and scope of your general obligations when acting as an expert witness, in particular that the overriding duty of the expert witness in giving evidence is to the tribunal;

(b) ensure that there is a written record, held by you and sent to (or received from) your prospective client, as to the matters on which expert evidence is required, whether such record is upon the initiative of yourself or those instructing you, and confirm in writing if you propose that any part of the assignment is likely to be undertaken by a person other than yourself;

(c) carry out a check to satisfy yourself that no conflict of interest arises (see also BP 2.5–2.6). If you have any doubt whatsoever in this respect, any potential or actual conflict must be reported to those offering instructions as soon as it becomes apparent. If you consider that the tribunal might attach less or no weight to your evidence as a result of such circumstances, you must advise your prospective client accordingly.

**3.4** (a) Chartered Surveyors acting as expert witnesses should not seek or accept a conditional fee arrangement. A conditional fee is one that provides that the expert's fee is not given (or will be given at a predetermined lower rate) where the case does not end in success for the party. It should be noted that the Law Reform Commission's consultation paper specifically proposes that such arrangement be prohibited.

(b) Where the fee arrangement for your instructions is intended to be a contingency fee (i.e, based on a percentage of the Award or Determination) you should, prior to accepting instructions to act as an expert witness, advise your prospective client of the risk that the tribunal may view evidence given under a contingency fee arrangement as being tainted by bias, and may attach less weight to it; it may even refuse to admit it at all, or find the whole conditional fee arrangement void.

**3.5** Any potential or actual conflict arising after instructions have been accepted must be notified immediately to your client. In such circumstances the same reporting procedures and considerations as per 3.3(c) above should apply.

## **4 Inspections**

**4.1** Where any inspection of any property/facility is, in your view, required, it must always, where reasonably possible, be carried out to the extent necessary to produce an opinion that is professionally competent. This should have regard to its purpose and the circumstances of the case.

## 5 Reports and oral evidence

5.1 In providing a written report to be lodged before a tribunal, you must comply with any rules, orders or directions of the tribunal to which the report is to be presented. You should:

(a) Give details of your qualifications, and relevant experience, knowledge and expertise (commensurate in detail with the nature and complexity of the case).

(b) State the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to you that are material to the opinions expressed in the report or upon which those opinions are based.

(c) Give details of any literature or other material which you have relied upon in making the report, including the opinions of others.

(d) State who carried out any test, experiment or survey which you have used for the report, the methodology and nature thereof, and whether or not the test, experiment or survey has been carried out under your supervision.

(e) Give the qualifications and relevant experience, knowledge and expertise of the person who carried out any such test, experiment or survey.

(f) Consider all matters material to the instruction. You must state clearly all assumptions and facts upon which your opinion and reasoning is based, distinguishing between those facts that you believe to be true and those you have assumed (specifying those you have been instructed to assume). Where facts are known to be in dispute you must state separate opinions on each hypothesis put forward. A view in favour of one or other disputed set of facts should not be expressed unless, solely due to your particular experience, knowledge and expertise, you consider one set of facts to be improbable or less probable, in which case a view can be expressed with appropriate reasons. You must indicate where, in what way and why, an opinion is provisional, if you consider that further information is required or if, for whatever reason, you believe a final and unqualified opinion cannot be expressed.

(g) Where there are ranges of opinion on the matters dealt with in the report:

- (i) summarise the ranges of opinion and their sources; and
- (ii) give reasons for your own opinion.

(h) Include a summary of the conclusions reached.

(i) Verify the report with a Statement of Truth. The following wording is suggested:

‘I confirm that insofar as the facts stated in my report are within my own knowledge I believe them to be true and I have identified them as such, that where I have relied on facts provided by others I have used my best endeavours to establish the veracity of said facts, and that the opinions I have expressed represent my true and complete professional opinion.’

(j) Include all the following declarations at the end of the report:

(i) ‘I confirm that my report includes all facts which I regard as being relevant to the opinions which I have expressed and that attention has been drawn to any matter which would affect the validity of those opinions.’

(ii) ‘I confirm that my duty to [*specify the tribunal*]\* as an expert witness overrides any duty to those instructing or paying me, that I have understood this duty and complied with it in giving my evidence impartially and objectively, and that I will continue to comply with that duty as required.’ (\*The reference used may vary, as appropriate to the particular forum.)

(iii) ‘I confirm that I am not instructed under any contingency fee arrangement.’

Where however you are instructed under a contingency fee arrangement, you should disclose that fact by making this declaration to the tribunal: ‘I confirm that I am instructed under a contingency fee arrangement.’

(iv) ‘I confirm that I have no conflicts of interest of any kind other than those already disclosed in my report.’

(v) 'I confirm that my report complies with the recommendations of the Society of Chartered Surveyors (SCS), as set down in The Chartered Surveyor as Expert Witnesses : A Guide to Best Practice '

(k) Personally sign and date the report.

**5.2** The scope of 5.1 covers written reports. In relation to expert evidence to be given orally where no written report has been lodged or submitted to the tribunal, you should at the outset declare to the tribunal that the expert evidence you give complies with the requirements of the Society of Chartered Surveyors (SCS), as set down in The Chartered Surveyor as Expert Witnesses: A Guide to Best Practice; or, in the event, any departure from the requirements of the SCS should be outlined to the tribunal. You should also declare to the tribunal whether you are instructed under a contingency fee arrangement.

## **6 Amendment of the contents of written reports**

**6.1** If after disclosure of your report you identify a material inaccuracy or omission, or have a change of opinion on any matter, you must without delay and in writing notify any intention to make changes, and the reasons for such changes, to:

(a) those instructing you;

(b) other parties to the dispute (through legal representatives, if any); and

(c) where appropriate, the tribunal.

**6.2** You may be invited to amend or expand a report to ensure accuracy, consistency, completeness, relevance and clarity. You must disregard any suggestions or alterations that do not accord with your true opinions, or distort them.



## **7 Agreeing facts and resolving differences**

**7.1** As an expert witness, you may be instructed by your client to communicate with the other party in an attempt to agree facts, and to clarify, narrow and resolve the differences between parties. You may in any event be ordered to do this by the tribunal; you must follow any lawful order or direction of the tribunal, notwithstanding any directive by a client to the contrary.

**7.2** Where, for any reason, you are unable to comply with any order or direction of the tribunal concerning the matters set out in 7.1, you should as soon as practicable:

- (a) prepare a written record of the reason for such non-compliance; and
- (b) give copies of that record to your client and to the tribunal.

**7.3** Even where you have not been instructed by your client to communicate with the other party or so ordered by the tribunal, or where the tribunal does not specify any requirements in regard to the manner or scope of such communications, you must raise with your client the possible advantages, disadvantages and appropriateness of:

- (a) making such communications at as early a stage as possible;
- (b) identifying with counterpart experts the issues in dispute, the reasons for any differences of opinion and the actions that might be taken to resolve outstanding issues between parties;
- (c) preparing a statement for the tribunal showing:
  - (i) those facts and issues which are agreed;
  - (ii) those facts and issues which have not been agreed and the reasons for any disagreement on any issue.

## **8 Advocacy and expert witness roles**

**8.1** In certain circumstances surveyors can act in the same case (but not at the same time) both as surveyor-advocate and as expert witness (see also *The Chartered Surveyor as advocate: A Guide to Best Practice*; SCS). This is known as acting ‘in a dual role’. You should only act in a dual role where:

(a) neither the rules nor the customs of the particular tribunal prohibit you from so acting; and

(b) other relevant factors make it appropriate (e.g. the disproportionality of retaining two persons in separate roles).

**8.2** Where however you intend, or are invited, to act in a dual role as surveyor-advocate and as expert witness you should, having regard to 8.1 above, consider both whether it is permissible to do so (see also 3.1) and also whether or not it would be disproportionate in all the circumstances, or otherwise in the client’s best interests, for a separate person to be retained to undertake one of the roles.

**8.3** Where you act in such a dual role, you must clearly distinguish between those two roles at all times, whether in oral hearings or in written presentations.

**8.4** It has been the custom and practise for Surveyors acting in dual roles to have contingency fee arrangements. These should be disclosed to the Tribunal. (see 9.1)

## **9 Contingency fees**

**9.1** Where you are instructed to give expert evidence under a contingency fee arrangement (see also 3.4), you should declare the existence of such a contingency fee arrangement to the tribunal (see 5.1(j)(iii)), so that its effect can be taken into account. For the avoidance of doubt, 9.1 also applies to your expert witness role where you are to act in the same case in a dual role (i.e. both as expert witness and surveyor-advocate – see also *The Chartered Surveyor as Advocate*: 3.5).

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