



Hot-Tubbing - The Experts Friend?

Concurrent Expert Evidence (CEE), sometimes referred to as witness conferencing, but colloquially known as “hot-tubbing”, is the practice whereby two or more experts at a hearing give their evidence concurrently, thus enabling simultaneous questioning and discussion on the key issues.

With hot-tubbing becoming increasingly common in dispute resolution, HKA's Peter Caillard shares some reflections from a practising expert's viewpoint, and asks: Is Hot-Tubbing the Expert's Friend?

Context

There is often a battle between opposing legal teams (who seek the best outcome for their respective clients) and the decision maker (whose objective is to arrive at a good decision). Decision makers – be they judges, sole arbitrators or arbitral panels - will wish to compress the experts into narrowing the issues. Hot-tubbing contributes towards this process and should be seen as part of a continuum which includes preparing reports, meetings of experts, presentations, cross-examination, and hot-tubbing. However, legal teams often fear a loss of control in a decision-maker led hot-tubbing session, and for this reason its use remains controversial. All of this can be seen in the context of a struggle for control of the agenda between legal teams. The Experts and their opinions are at the centre of this struggle.

Background

Hot-tubbing had its origins in Australia in the 1970s. Its intention was to facilitate a discussion chaired by the decision-maker which encouraged cooperation between the experts towards agreement on key issues. Since then, its use has spread worldwide. In the UK, the Civil Procedural Rules Part 35 provide guidance for conducting the procedure.

The process can take varying forms in different jurisdictions. It can be used as an alternative to conventional cross-examination, or in addition to it. Questions may be put by each party's counsel, the decision-maker, or more commonly, both. The process extends naturally from the preparation of a joint statement whereby opposing experts have already discussed issues and recorded acknowledged areas of agreement and disagreement. Indeed, the joint statement is typically employed as the agenda for this part of the proceedings.

Hot-tubbing is usually led by the decision-maker and this helps reinforce that the experts' paramount duty is to the decision-maker, not their client.

Benefits

With conventional cross-examination, experts can sometimes feel frustrated should counsel adopt an aggressive line of questioning, an approach which may appear to be principally aimed at discrediting them and /or diverting attention from the pertinent and relevant matters of the case. Some might argue that this is counsel's job, but regardless, such a line of questioning is much less sustainable in the hot tub. Firstly, many of the questions will be asked by the decision-maker. Whereas opposing counsel's questions are likely to be testing the expert and their evidence, the decision-maker's questions tend to focus on understanding the expert's position and reasoning, not trying to catch them out. Consequently, hot-tubbing provides greater opportunity for the expert to explain an opinion compared with the narrow nature of cross-examination.

It also encourages the experts to find common ground. Writing a report remotely with your client or instructing lawyers' scathing criticisms of the other side's position ringing in your ears, there is a risk that you may lean towards a critical opinion yourself. Initially, your criticism may pass unchallenged. However, sitting in the hot-tub, with your industry's peers alongside espousing reasoned argument, your credibility relies upon you being reasonable in response.

The Expert's Friend?

Hot-tubbing favours the expert who is well prepared, knows their subject, and who avoids the temptation to offer advocacy for their client's case. Arguably it also favours the expert who is articulate and whose presentational skills are well-honed, although these qualities will not save the practitioner whose evidence is found wanting.

Furthermore, in cross-examination, counsel, however skilled and eloquent, suffers from one fundamental disadvantage - they are unlikely to possess the same level of subject matter understanding as the expert, and when questioning, may not always be able to react instantly to an answer which they do not fully comprehend. There is no-one to whisper in their ear with that killer follow-up question. In the hot-tub however, where other experts are on hand to provide instantaneous responses, there is less chance that flawed evidence will pass unchallenged or undetected. The hired gun is more easily exposed as ill thought-through argument will fall apart.

For many experts, the hot-tub experience is less daunting than cross-examination. The intensity of the spotlight is now shared. Critical thinking time is available while the other expert is speaking.

Most experts welcome the more relaxed and less formal atmosphere of the hot-tub, and the opportunity it presents to explain opinions rather than simply providing responses to opposing counsel's carefully crafted questions. In the hot-tub there is nowhere to hide, but the expert who is focussed on assisting the decision-maker to reach the right decision does not need a hiding place.

The Decision-Maker's Friend?

Hot-tubbing remains popular and its use in dispute resolution is growing. It enables and encourages instantaneous discussion. Whereas in the hot-tub, an opinion proffered by one expert is quickly and easily referred to the other expert for a response, under cross-examination opposing experts may take the stand several days apart.

More importantly, joint discussion encourages experts to identify not only points of disparity but matters of agreement. This is of fundamental assistance to a hearing which is attempting to narrow down the issues.

There is little that pleases a decision-maker more than experts who have genuinely tried to find common ground! Although an independent approach cannot be forced upon experts, the format of the hot-tub facilitates and indeed encourages discussion and dialogue; the expert who acts as the hired gun is far more likely to be exposed than under conventional cross-examination.

Conclusions

A good expert has nothing to fear from hot-tubbing – indeed, they should relish the opportunity. An expert who has performed to their brief with diligence, provided honest and thought-through opinion, and remained cognisant of their primary duty to the decision-maker, will find that the hot-tub is their friend - indeed their credibility will shine through!

Contact details



Peter Caillard
Partner
petercaillard@hka.com
T: +44 (0) 7812 500 594

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