Practice and Parliamentary

THE SURVEYOR AS AN EXPERT WITNESS

A one-day course arranged by CALUS was recently held in London and well attended by members of the estate profession, including a number of quantity surveyors. The course was sponsored by the General Practice Division of the RICS, and the proceedings were opened by P. D. Orchard-Lisle, TD, MA, FRICS, President of that Division. W. H. Rees, BSc, FRICS, a member of the Lands Tribunal, was the Chairman and the speakers were G. A. Eve, FRICS (Surveyor), G. R. R. Hart, LLB (Solicitor), M. St. J. Hopper, FRICS (Surveyor), M. B. Horton, MA, LLB (Barrister), D. J. Morton, FRICS (Surveyor) and R. C. Walmsley FRICS (The Lands Tribunal).

The general background was the role of surveyors in connection with proceedings in the High Court, the Lands Tribunal, planning appeals, public enquiries, etc. However, general principles and practices are common to all such proceedings and, as such, are also relevant to the interests of practitioners concerned with disputes in the construction industry.

The following points of interest emerged from the papers and the subsequent question/discussion:–

1. The activities of an expert witness may be divided into three phases:
   (a) qualifying to give evidence;
   (b) preparing a Proof of Evidence;
   (c) giving evidence.
2. The cliché: 'there are horses for courses' applies to solicitors, barristers and professional advisers; in selecting the barrister and professional/technical consultants to form the 'team' engaged for a particular matter, the instructing solicitor has to take into account the question of personal compatibility between them and the client as well as between each other.
3. The surveyor should write, read, edit, re-write and re-read his Proof of Evidence; if anything is capable of being misunderstood – it will be. An expert witness must have been personally involved in pre-trial 'home-work' in order to remain credible under cross-examination. 'Asserting' is not the same as 'proving' – for 'he who asserts must prove'. The weight attached to eminence/experience is not as great as it was and sweeping statements such as 'I have been fifty years in the profession' are no longer treated with the reverence they once attracted.
4. Witnesses of fact should not be present at any pre-trial conference with counsel and it remains an open question whether witnesses of fact *and* opinion should attend. When attending a conference, the surveyor should not assume that counsel knows everything – especially about professional/technical matters. However, 'face' is an element not to be overlooked, and it is not wise to 'upstage' him. Even so, the surveyor must be honest enough to expose any weaknesses in the case he is called to support. He should also be aware of how his evidence fits into the general strategy adopted by counsel and he should not hesitate to offer his own opinions about the legal principles involved. Such opinions should not be included in the surveyor's Proof of Evidence and are better conveyed in supplementary 'Notes for Counsel'.
5. When a client disagrees with a consultant's advice, he should be listened to with patience and, if it is agreed that the client's objections have substance, the consultant should be prepared to modify his report accordingly.
6. The degree of formality in various sorts of proceedings has been known to vary from being too rigid (High Court), too slack (Planning Appeals) and about right (The Lands Tribunal).
7. At the hearing, a 'witness-in-waiting' can take notes — which can often help to fill gaps in other records.

As D. J. Morton reminded the audience, the best advice for all contenders may be to settle as soon as possible and, in confirmation, referred to St. Matthew 5 : 25 –

'Make friends quickly with your accuser, while you are going with him to court, lest your accuser hand you over to the judge, and the judge to the guard, and you be put in prison.'

Otherwise, additional loss of time and money, if not liberty, may be the result for the unsuccessful party.

A. T. G.

THE COST OF VANDALISM

This was the title chosen by the National Housing Consortia for their 1979 Annual Symposium held on 21st March under the chairmanship of Councillor John Bradley, Chairman of the Housing Committee of the Association of Metropolitan Authorities.

In opening the proceedings, the Rt. Hon. Reg Freeson, MP, Minister for Housing and Construction, suggested that we should begin by looking beyond vandalism itself to our society which is to a great extent characterised by insecurity, frustration and boredom. Subsequent behaviour engenders alienation which, in turn, lies at the root of many other problems. Adults, he indicated, must bear the greatest blame for attitudes which tolerate and, in some cases, perpetrate such socially irresponsible behaviour as litter-dropping, aerosol spraying and passively observing the anti-social antics of children and young people. As antidotes, he wants to see a greater degree of 'community involvement' by individuals and a more sympathetic 'neighbourhood approach' by local authorities – both of which are encouraged by the current Housing Bill. If and when it is necessary to punish offenders, said Mr. Freeson, this should be on the basis of restitution rather than retribution and, he added, in all this the authorities (Central and Local Government) should be seen to be operating at the centre rather than at the apex of the administrative pyramid.

By the end of the day, a great many interesting comments and suggestions had been made by the invited speakers, as well as other contributors, about the sociological factors which

breed and nourish delinquency in general and vandalism in particular; also, about possible ways and means of achieving better landlord/tenant relationships in public sector housing.

The only evidence of cost – which, after all, was the subject of the Symposium – was offered by Donald Ritson, Assistant General Manager, Milton Keynes Corporation. On the basis of an inconclusive survey, he indicated that one New Town had spent £25/30,000 on making good vandalised loss/damage in one year; another had spent £36,000 before and £9,500 after the occupation of particular dwellings. Even so, the incidence of such loss/damage in new towns appears to be lower than in other situations.

Edward Hollamby, OBE, Director of Development at Lambeth, concluded that the Seminar had produced no new remedies for the maladies discussed. Could this be due to searching for them in a too-limited field? As another speaker put it: 'vandalism is people' – and several speakers emphasized the need to change the attitudes and behaviour of individuals – mainly by education. But, if Owen Luder, Architect, was correct, this process could take up to three generations to achieve. One attender was left hoping that a future conference, if one is arranged, would include some reference to the philosophical/religious concepts of human nature and examine in greater depth the spiritual needs of human beings.

However, the best summary of the proceedings is perhaps the quotation from a speech on 26th April 1978 by the Prime Minister, the Rt. Hon. James Callaghan, MP, which was printed in the Seminar programme – 'Violence is nothing new. But vandalism, wanton and motiveless destruction of property, is reaching a new scale. The cost is enormous, estimated by the Home Office at tens of millions of pounds a year. It brings not just inconvenience but also real danger to the public; and it creates such ugliness. Streets, parks, houses take on an air of neglect and decay – destroying any pride felt in the neighbourhood and eating away at the soul of the community. Everyone suffers eventually. How important, then, that schools, parents and the communities face up to their responsibilities, together and working with the police, to turn back the tide of crime, to find again the close web of relationships which interdependence and shared problems create in caring communities.'

A. T. G.

CLERKS OF WORKS ON BUILDING PROJECTS LET UNDER THE JCT STANDARD FORMS OF BUILDING CONTRACT

By A. E. Batty, FIQS, FIArb

In common with all other members of the human species, those particular persons called upon to be clerks of works can be good or bad at their job. The virtues attaching to goodness need no commentary. The troubles which come from badness, however, are another matter. This commentary is intended to help in overcoming problems caused in building works by inexperience or genuine badness in a clerk of works. I use the JCT(RIBA) form of contract because it is the most commonly used standard form of building contract. In the event of any other form of contract being used, my comments here should be taken as a general guide, the more important parts of which should be verified by reference to any special clauses dealing with the authority of the clerk of works in the special contract.

No amount of expert knowledge will save a bad builder from the consequence of his imperfections. Nor will it help much if the builder fails to appreciate that a clerk of works is obliged to perform his duties in the exercise of a very necessary job. A builder will gain more benefit by building properly than he will by any knowledge of contractual rights and duties. A builder will gain more benefit by seeking to establish a fair and reasonable relationship with a clerk of works than he will from lecturing the clerk of works about what he may and may not do. However, the key words are "fair and reasonable".

What is fair and resonable always depends upon the circumstances. We cannot expect a second-hand mini to produce the performance characteristics of a brand new Rolls-Royce. That is a familiar illustration in the building industry of precisely the problem caused by a clerk of works who is genuinely unreasonable. To put the problem in proper perspective I now move to contractual considerations . . . but I stress that reasonableness is found only in response to reasonableness. The hard letter of any contract should be used only when genuine reasonableness finds itself flowing down a one-way street.

What powers does a clerk of works enjoy under the contract?

Clause 10 in the JCT(RIBA) contract states that the duties of the clerk of works are . . ."to act solely as inspector on behalf of the Employer under the directions of the Architect/Supervising Officer". That is the full extent of the powers granted to a clerk of works. A builder must recognise the duty to inspect, but must not magnify that duty into something larger, "to act solely as inspector". . . Those are very limiting words, and all good clerks of work will welcome such importance and significance as fall within the limitation. On practically every building project the architect and quantity surveyor nominated by the employer seek to enlarge the duties which a clerk of works must perform. For example; many contract bills will often ask a builder to present daywork records for signature by the clerk of works; thereby seeking to make the clerk of works the architect's "authorised representative" within the meaning of the last paragraph in contract clause 11(4)(c). Such action is a breach of contract clause 10. A good clerk of works is well entitled to tell his architect that valuation of variations by daywork is a matter more properly within the province of the nominated quantity surveyor. A clerk of works is not entitled to verify daywork records, since the contract very clearly states that his duties are "to act solely as inspector on behalf of the employer" and his countersignature to any daywork record is contractually meaningless. His signature is often practically meaningless, as well, if the quantity surveyor decides to ignore any daywork record because a variation is too expensive when valued in that manner!

The illustration regarding dayworks is but one example. There are many others. Some builders treat a clerk of works