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## The benefits of instructing experts early in disputes

### About this issue

This thoughtpiece considers the role of financial expert witnesses assisting with quantifying claims, where a main objective is to determine sums of money in compensation.

This issue has been co-authored by Thayne Forbes and Stuart Whitwell from Intangible Business, based on their forensic experience gained from giving expert evidence over the last 25 years. Their work has involved the production of over 100 expert reports, and oral testimony (including under cross-examination) on more than 12 occasions. This article also reflects the views of others involved in the dispute resolution process, in particular from the parties, lawyers, arbitrators and judges.

The authors' specific expertise is in the fields of global valuation, accounting, marketing, lost profits and excessive or wasted costs. They have provided independent expert evidence in disputes involving issues of both liability and quantum. However, although this article draws mostly on their specific expertise and experience, much of

what follows can properly be regarded as of general application in the preparation and presentation of effective expert evidence.

In addition we asked ChatGPT, an artificial intelligence chatbot developed by OpenAI, about the benefits of instructing expert witnesses early in the dispute resolution process. ChatGPT made a useful contribution and backup to this thoughtpiece.



## 1. Strengthening the case

Experts possess specialized knowledge and experience. Through early involvement, they can help assess the strengths and weaknesses of the case as they relate to their expertise. This allows a stronger case strategy to be built and identifies critical issues that need to be addressed at an early stage.

## 2. Early assessment of merits

Experts can evaluate the evidence and provide an unbiased opinion about the merits of the case as they relate to their expertise. Their input can help both parties gauge the potential risks and rewards of pursuing the dispute further and can lead to an earlier resolution.

## 3. Helping to optimize resource allocation

It may seem simplistic, but understanding the money at stake for a point helps in allocating resources allocated to that point. We have seen many times a lot of effort and cost expended on an issue, which was ultimately irrelevant as the related amounts at stake were insignificant. Also, by its very nature, the adversarial process can sometimes involve a disproportionate and unnecessary application of resources, for example if one or both sides decide to take every point they can.

However, resource allocation goes further than this. Understanding issues with the most money, and which are the most easily quantified, helps to focus on the key issues all the way through a dispute resolution process, and in particular in:

- formulating the claim;
- disclosure of documents;
- identifying appropriate witnesses of fact; and
- other expert witness evidence.

This approach will also assist with alternative ways of resolving the dispute, such as through mediation or negotiation. These can be carried out earlier, with less cost and where the parties control the dispute

resolution process rather than ceding resolution, for example, to a court.

## 4. Bringing in additional claims

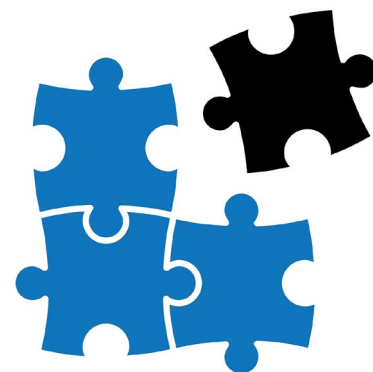
Bringing in experts early can help with additional claims being identified and quantified on behalf of their ultimate clients.

### *Example:*

We were instructed early in the process to quantify losses incurred with respect to warranties covering trade marks in a sale and purchase agreement for the sale of a company. This had been identified by our instructing solicitors as a counter claim. Once quantified, and resolved through the judgment handed down, the counter claim for lost trade mark value eclipsed the other claims and helped in a good defence being put up to the other claims being made.

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If brand value has been damaged that is likely to be a significant claim



## 5. Costs are necessary, proportionate and optimized

It might be thought that bringing in experts late in the process should reduce their cost. However, involving expert witnesses early should lead to cost savings in the long run. Experts can help avoid unnecessary time and costs by identifying the strengths and weaknesses of the expert elements of the case. Parties can then avoid a prolonged dispute resolution process that might otherwise have ensued.

Bringing in experts late in the process is also risky as they might:

- not be available to do the work in the timescales required, and therefore have to turn the instructions down;
- have their instructions restricted to the extent that they cannot cover something vital;
- not have enough time to carry out their instructions properly; and
- work ineffectively and inefficiently in tight timescales, for example if a large team is gathered to support the expert.

### *Example:*

We were instructed late in a case between a large pharmaceutical company and a construction company for breach of contract. As part of our work we identified a piece of vital evidence, a log book recording damaged inventory. This would have been useful for quantifying the claim, but as it had been discovered too late it could not be used.



We have also sometimes seen expert reports qualified by stating that information and time available were not what they required. This is obviously undesirable.

When experts are brought in early this should not lead to unnecessary cost. We would expect experts brought in early to work with instructing solicitors to ensure that resources applied are necessary, proportionate and optimized.

## 6. Reducing surprises

Early involvement of expert witnesses helps prevent last minute surprises at critical phases of the dispute resolution process. It also gives more time to address any unexpected challenges that arise from an expert's analysis.

## 7. Ceding control of a dispute to experts is inappropriate

It might be thought that bringing experts in early might lead to some ceding of control of a dispute to experts. Whilst we have seen this happen, we do not think it is appropriate and would not do it ourselves. The role of experts in our view should be kept to their expertise, which should not extend to some management role for significant disputes.

## 8. Bringing in experts early has many overall advantages

We consider that consideration should be given to bringing in experts early in a dispute to:

- strengthen the case;
- give an early assessment of merits in the experts' field of expertise;
- help in optimizing resource allocation;
- develop additional claims on behalf of their ultimate client;
- ensure costs are necessary, proportionate and optimized; and
- help reduce surprises at critical phases.

However, a significant part in managing a dispute should not be ceded to expert witnesses. Dispute resolution management should rest with the parties and their lawyers.

## 9. Confidentiality

Due to the confidential nature of much of our work, only a few details can be disclosed and some of the examples given have been edited to preserve confidentiality (whilst fairly illustrating something which has actually occurred in our experience).



### Dispute resolution services offered by Intangible Business:

Accounting, marketing, investment banking, research, commercial skills, knowledge and experience.

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- Intangible asset and intellectual property value
- Share value
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- Related revenues and costs

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Intangible Business Limited  
Dolphin House, 14 Woodside Road  
Kingston upon Thames, Surrey KT2 5AT  
[www.intangiblebusiness.com](http://www.intangiblebusiness.com)

## Our team of experts

### Thayne Forbes



Thayne is a qualified accountant and marketer who has worked in consulting firms on valuation, dispute resolution and other special assignments since 1988. Thayne focuses in advising on all types of intangible asset valuation dispute resolution projects on a range of issues across many different industries.

e: [thayne.forbes@intangiblebusiness.com](mailto:thayne.forbes@intangiblebusiness.com)

t: +44 (0) 79 7965 5653

### Stuart Whitwell



Stuart is a qualified accountant and marketer who has 20 years of commercial experience with Reed International, Haliburton, Sea Land and Allied Domecq. Since 2000 Stuart has focused on all types of intangible asset valuation projects and has particular experience in the global beverages industry.

e: [stuart.whitwell@intangiblebusiness.com](mailto:stuart.whitwell@intangiblebusiness.com)

t: + 44 (0) 77 4703 7824

