Forensic accounting in the hot tub

Despite many requests, this is not an article containing photographs of the FAR Consulting Christmas party, but Phil Southall sharing his recent experience of "hot-tubbing" in the professional context.

Hot-tubbing has been used in Australia for a number of years; well, they do have the right climate for it I hear you say! However, from 1 April 2013 the process of providing "concurrent expert evidence", commonly referred to as hot-tubbing, has been incorporated into the Civil Procedure Rules. Therefore, the court can now direct that expert witnesses from like disciplines are sworn in together and give their evidence concurrently. This provides the judge with the opportunity to put the same questions to both experts, and listen to them debate each issue.

From an expert's perspective, the process of debating points of agreement and disagreement is very similar to any expert meeting, or the type of meeting that can be convened during mediations, but held in front of the clients and the mediator rather than a judge. Therefore, if my experience is representative, given that experts are far more frequently involved in expert meetings and mediations than in being cross-examined, it is a process that I am sure many experts will be comfortable with conceptually. Moreover, whilst there was concern amongst solicitors that an expert might unwillingly make certain concessions in a less formal debate, given that we are generally more used to having discussions of this nature, I don't personally consider this to be an issue.

Indeed, I recently got into a hot-tub with a fellow accounting expert at an arbitration hearing. The arbitrator, and then each party's respective counsel, had the opportunity to put questions to both of us. I must admit that it did feel exactly like a cross between having an expert meeting and being cross-examined. The experts debated each issue sequentially, much like we would in any expert meeting. However, unlike in an expert meeting, where the experts themselves choose the issues which they debate, in this forum, the issues were being put to us by the arbitrator and respective counsel.

In brief my other observations on this process are as follows:

- I personally consider that the main benefit lies in allowing a judge or arbitrator to hear the experts put forward their opinion on each issue simultaneously, so as to assess whose evidence they prefer on each issue;

- it allows both experts to be heard on all the issues deemed relevant, rather than say have one expert address a point not covered previously by the other under cross-examination;

- it also ensures opinions are comparable and based on the same assumed fundamentals, rather than on different underlying assumptions, which is, in my opinion, the most common reason for differing expert opinions. This is particularly the case for accountancy experts, where the differing assumptions often do not concern matters of accountancy evidence, but issues of fact or law for the judge to consider. The benefits of hot-tubbing therefore include:

    - a detailed expert discussion on the specific issues which are important to the judge, rather than on issues which are primarily of importance to the experts, which may happen in an expert meeting; and

    - it may save time in cases where the accountancy evidence depends on the underlying facts. Historically, one barrister may have spent considerable time questioning an expert on a set of assumptions which were then ultimately ignored by a judge;

- hot-tubbing allows weaknesses to be more readily exposed and then debated, than under sequential cross-examination. That being so, it is then important that each legal team has been properly briefed beforehand by their expert on any potential weaknesses within their report that may be susceptible to challenge, and how such weaknesses may impact on their conclusion financially; and

- I also think that an expert debate on the issues which a judge deems relevant is more akin to the over-riding principle that an expert's duty is to assist the court. In essence, if conducted correctly, an open debate is more likely to inform the court of all of the pertinent facts regarding the issues of relevance to the judge, rather than the succinct responses demanded under cross examination. In effect, it better allows an exploration of the issues, rather than the presentation of one side's case. Whether this is desirable may depend on the strength of your case.

In implementing these changes to the CPR, there may be an expectation that hot-tubbing may reduce costs, on the basis that there may be less time required for cross-examination. However, given that the court still needs certain issues to be clarified, and that there may now be a more in depth expert discussion of those issues, rather than experts merely providing abrupt, succinct answers, I personally am unsure as to whether any cost savings will follow.

Additionally, there may also be a perception that an aggressive expert now may be able to gain the upper hand on a more passive expert, but again, I do not necessarily consider this to be the case. Firstly, an aggressive expert may lose credibility, as they may give the appearance of having a lack of objectivity, just as they may have done under the traditional system. However, in my experience, judges prefer substance over presentation, and a well reasoned argument is still likely to prevail over a loudly argued, or more frequently repeated, weaker argument.

However, this is still a relatively new concept, and it remains to be seen how common-place hot-tubbing becomes in future.