Your Witness

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New Solicitors' Code of Conduct

Brought into force on 1 July 2007, the new *Code of Conduct* for solicitors has been published by the Solicitors' Regulation Authority (SRA). The code is the new 'rule book' for solicitors. Naturally, this development is mostly of passing interest to expert witnesses. However, the predecessor rules (*The Guide to the Professional Conduct of Solicitors 1999*, eighth edition) contained a few provisions expert witnesses have found to be of significant value. Chief amongst these was Principle 20.01 and its attendant guidance.

In essence, this Principle imposed upon solicitors a *personal* responsibility for the fees of any expert they instructed. Many experts have found that, with the proper contractual relationship in place from the outset, reminding a solicitor (who was dragging his heels on payment) of the wording of 20.01 very often resolved the matter.

Alas Principle 20.01 is no longer included in the Code of Conduct and I have been assured by the SRA that there are no plans to resurrect it. Mind you, Principle 20.01 was only ever a helpful extra for the expert seeking payment of his fees. If the expert has followed our guidance on using written terms of engagement, and perhaps taken advantage of the free *Terminator* service on our web site (see page 8), there ought to be little impediment to securing one's fees regardless of the wording of the Solicitors' Code of Conduct.

When a solicitor goes to the wall

Following my warning against dealing with medico-legal agencies in the last issue, I received an interesting note from one of our listed experts. This pointed out that whilst he had lost a small amount to failing MROs, he was left thousands of pounds out of pocket when a firm of solicitors failed.

We will be dedicating an article to this area in the next issue of *Your Witness*. In the meantime, though, you may be interested to learn that the Law Society maintains a compensation fund. It exists to protect the interests of solicitor clients, and not individuals and professional persons a solicitor might have contracted with for the supply of goods and services.

Generally speaking, and in accordance with the SRA's position, experts will be treated as ordinary trade debtors of a solicitor and will be required to pursue payment of their bills using the ordinary remedies available to them.

However, experts might be entitled to compensation in cases where:

1) they have sustained loss due to a solicitor's dishonesty, or

2) where the expert can otherwise demonstrate that he is owed money by a solicitor under a contract and the solicitor's failure to account for this money is causing the expert exceptional hardship.

The first head, dishonesty, is very difficult to prove. Indeed, it is quite rare for individuals to be able to show that the actions of a solicitor in failing to account for money in these circumstances actually amount to 'dishonesty'.

However, the second head, exceptional hardship, is one that the Law Society will look at on its merits. The SRA has told us that 'exceptional hardship' does not mean that the expert is in abject poverty as a result of the solicitor's failure but rather that the expert has sustained a 'loss he can ill-afford'. If the expert is an individual in private practice (as opposed to a large organisation or a limited company or partnership), the SRA has suggested to us that a fee of £1,000 or more might fall into this category. But each case would be looked at on an individual basis.

New edition of the Register

Preparations for the new edition of the *UK Register of Expert Witnesses* have begun. It hardly seems possible that the next edition will be our 21st. As the *Register* 'comes of age', I have been looking at our retention rates, i.e. how many experts stay with us from year to year. Every directory will see some people drop out each year as they retire, etc. But a good directory will have a high retention rate as those listed see the value of continuing to be included. The *Register* has an excellent retention rate, comfortably above 90%. Indeed, we have over 1200 experts who have been with us for at least 10 years, and a very dedicated cohort of 414 experts who have been with us for over 15 years!

The reason for such long-term commitment to our services is, of course, not because we are nice people (though we do try to be that) but because of the added-value that accrues from inclusion in a market-leading directory year in, year out.

A draft of your entry for edition 21 will be sent to you over the New Year for you to check, sign and return. If you will be away during the first half of January you may wish to contact us now so we can make appropriate arrangements. Meanwhile, everyone here at J S Publications sends their best wishes to you for a Happy Christmas and prosperous New Year.

Chris Pamplin

Inside

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Retention of documents

Retain papers for fee disputes, disciplinary proceedings, appeals, etc.

The documents that are received, prepared, assessed, considered and created by an expert in the course of proceedings are papers of importance. A document which at the time of the original hearing might have been considered trifling could suddenly take on new importance. It is not inconceivable, therefore, that an expert witness might be asked for a document months or years after the case has been concluded. The expert, then, is faced with a dilemma. Which documents in a case should he retain – and for how long?

Why retain documents at all?

There are a number of compelling reasons why experts should retain papers relating to the cases in which they have been instructed.

The machinery of the judicial system can be ponderous and convoluted. The tiered system of lower and upper courts, and the procedure for appeals, whether by way of case stated or rehearing, can mean that a case thought by all to be laid to rest can suddenly be reanimated. One need only look to the case of Sally Clark to see how the contents of an expert's report and the expert evidence generally can be brought back before judicial scrutiny long after the original proceedings have been concluded.

The expert's overriding duty is owed to the court. He is required to bring to the court's attention material that might assist the court in reaching a just decision. Whilst it is not expressly stated, we suggest that this overriding duty extends beyond the life of those proceedings and we think it implicit that the expert should retain with reasonable care any documents upon which his opinion was founded for a reasonable time after the trial or hearing.

The expert also owes a duty of care to those instructing him. Again, whilst not expressly stated, it is probably implied that such duty of care extends to the safe keeping of relevant documents for a reasonable time.

Aside from any duty owed to the court or any other party, the expert will have a personal interest in the retention of papers. Whilst the expert currently enjoys a level of immunity from suit, he is not exempt from judicial criticism or accusations of professional negligence or misconduct. Consequently, he will wish to ensure that, should he be called upon to do so, he is able to demonstrate that he complied with his duty to the court, acted in accordance with his instructions and reached his conclusions having exercised sound professional principles in relation to the facts and circumstances disclosed. In the shorter term, he may also wish to make reference to his instructions or his terms of acting in the event that there is a dispute with the instructing solicitor over contractual matters – such as timely payment! So, if it is wise to retain some documents, which are they?

Seek to return as much as possible to the instructing solicitor

Documents sent to the expert

Probably the first question for the expert to consider is whether the document belongs to him or is the property of another. In the case of documents supplied with his instructions, the answer is simple. Wherever possible, the expert should seek to transfer the burden of responsibility for the retention or otherwise of these documents to those who instructed him. The instructing party will usually be better placed to assess the merits of retention and the value of individual documents to the client.

Remember, however, that in the majority of cases such documents will be copies of originals, and the solicitor may not wish to have them sent back unannounced. In the case of obviously important, original or bulky documents, it would be a sensible precaution to make enquiries of the solicitor beforehand. The solicitor might, for example, want to make his own arrangements for collection or delivery and, in any event, the expert should take steps to ensure that vital documents are transferred safely and securely. So, our advice is to keep separate all those documents received with instructions and to try returning them to their original source when they are no longer required.

Documents the expert generates

This leaves the question of which of the expert's own documents he should retain.

The most important documents to keep are those comprising the instructions to the expert. The expert should also keep on file his terms of engagement and confirmation of acceptance by the instructing solicitor. In the event that any query arises, the wise expert will want to be able to clearly demonstrate the precise nature of his instructions, the issues upon which he was asked to express an opinion, the nature of the information supplied in relation to these issues and the contractual basis on which he had agreed to act.

Next, the expert should retain a copy of his report (including any drafts or supplements), copies of correspondence passing between him, instructing solicitors, the court or third parties or any similar documents coming into being for the purposes of the litigation. Bear in mind that relevant material might be in an electronic form and may only exist as an e-mail or other digital medium. There is probably no requirement to print these out, but it would be prudent to ensure that important information stored electronically is properly backed up.

The last (and potentially most problematic) category of documents is those the expert has considered or used in reaching his opinion and preparing his report. This final category may include citations, extracts from literature and copies of other reports, as well as other documents more expressly related to the individual case and its circumstances.

Documents that are a matter of public record or are drawn from an existing body of literature present less of a problem than those that are not. So long as the expert's report identifies the citations, authorities and extracts used, relied on or, in some cases, considered and rejected, there is no need to retain such extracts with the case papers. However, those documents that do not fall into this class and which have assisted the expert in reaching his opinion (whether they support or oppose it) should be retained.

Miscellaneous papers, such as copies of pleadings, copy witness statements, court orders and directions can usually be disposed of at the end of the proceedings, although it would be advisable to leave it a month or two before doing so. The exception to this would be any court papers relating specifically to the expert or the expert evidence, or those upon which the expert was required to act or take specific notice. While it is not the job of the expert to be the custodian of legal documents, if some question arises in relation to these documents the expert may be thankful to have a copy to hand.

Secure disposal

It is, perhaps, superfluous to say that documents relating to any legal proceedings are sensitive and may be privileged or confidential. If they turn up on the municipal rubbish dump there are likely to be some embarrassing questions concerning how they arrived there. Consequently, any documents requiring disposal should be treated with discretion. The best option is to shred them.

What is a reasonable time for retention?

What constitutes reasonable time will depend on the class of document concerned. *Primary documents* – those upon which a case is founded or which otherwise constitute the important evidence in a case – will be of greater importance than routine correspondence. The report itself, letters of instruction, associated documents and those used by the expert in reaching his opinion also merit some special consideration.

Let us refer to the remaining papers as *secondary documents*. It is reasonable to assume that secondary documents be retained for at least the time limits for an appeal. After the time limit for appeal has elapsed, we think it highly unlikely that an expert will be found to have behaved unreasonably if such routine items are destroyed.

The time for retention of primary documents is a trickier question to answer. While not perhaps having the same burden of responsibility as solicitors, experts can follow the example of their legal colleagues. Solicitors will usually retain client papers for a minimum of 6 years. There are some exceptions to this. For example, papers relating to land transactions will be retained for 30 years or longer, while papers dealing with simple commercial or contract matters might be kept for no more than 3 years. It is, perhaps, no coincidence that these periods correspond broadly with the statutory limitation periods for the bringing of actions in contract, tort and, more specifically, professional negligence (see Table 1). In times when commercial considerations were less acute and rentals were lower, solicitors retained papers for considerably longer time periods. But the costs of off-site secure storage and archiving dictate that this is no longer possible. It is not unfair to say that the primary purpose for retention is now self-preservation. Most solicitors retain documents only for as long as an action can be brought against them in relation to those papers or in relation to the matter in which they were used.

Contract	Negligence
Simple Contracts: 6 years from the date the cause of action arose (usually the date the contract was breached) **Contracts Under Seal (Deeds)**: 12 years from the date the cause of action arose **Latent Damage or Loss**: 3 years from the date the claimant had knowledge, or should have had knowledge of loss or damage, with a limit of 15 years from the date of contract. **Exceptions** For minors, time starts to run when claimant reaches 18 years In case of fraud, concealment or mistake, time will run from the date of discovery or from the date that discovery could have been made with reasonable diligence. Parties can agree to vary or exclude the limitation rules by contract.	**Resulting in Personal Injury or Death**: 3 years from the date the cause of action arose (usually the negligent act or omission that caused the injury) **In Other Cases**: 6 years from the date the cause of action arose, or in the case of latent damage 3 years from the date the claimant acquired knowledge of the relevant damage, with a limit of 15 years from the negligent act or omission. **Exceptions** With product liability, actions must be commenced within 10 years of the relevant time defined in s.4 Consumer Act 1987 or within 3 years from knowledge of damage, with a limit of 10 years from the date of supply.

Other types of action
Enforcement of Judgments: Enforcement action must be taken within 6 years of the date a Court judgment becomes enforceable. **Recovery of Rent**: Action must be taken within 6 years of the date the rent fell due for payment. **Recovery of Land**: Action must be taken within 12 years of the right to recover accruing (after that time, title will be extinguished). **Actions for Contribution**: i.e. a defendant's entitlement to claim against another party with whom he may be jointly liable for the claimant's loss. Limitation is 2 years from the right accruing.

Table 1. Statutory limitation periods together with exceptions to the general limitation periods.

It would be unreasonable if experts were expected to retain and store copious quantities of documents and materials in relation to every case in which they had acted. However, the special position experts hold in judicial proceedings, and the duty owed to the court, put them in a somewhat different category and do impose some additional burden. Experts can minimise this burden by seeking to ensure that, in so far as it is possible, the responsibility for retention falls on the instructing solicitor. Ideally, the expert will only need to retain such documents as might be required to show he has fully complied with his duties to the court and to demonstrate the soundness of his opinion.

Philip Owen

When the time comes, secure disposal is essential

Forensic science Tsar

New Tsar appointed to improve standards in forensic work

The Forensic Science Service (FSS) is a huge operation. It provides forensic science services to the police and acts as a source of training, consultancy and scientific support for overseas and private sector customers. Home Office figures claim that FSS scientists deal with ~130,000 cases each year, as well as attending about 1,800 crime scenes and giving expert evidence in court on 2,500 occasions.

In August 2006 the Home Office asked Alan Rawley QC and Professor Brian Caddy to carry out an independent review of forensic work undertaken by the FSS in the investigation into the death of Damilola Taylor. Their brief was, amongst other things, to make recommendations to the Home Secretary on:

- the need or otherwise for changes in examination procedures, recruitment, training and management of forensic scientists by the FSS
- the future role of a forensic regulator in the oversight of standards applicable to all suppliers of forensic services to the criminal justice system (CJS) within the UK.

New Tsar in the sky...

In July 2007, the Home Office announced new proposals it said were designed to promote a fully functioning forensic science market with 'the right services, at the right price, delivered to the appropriate standard'. To achieve this, it identified the need to ensure that the integrity of, and confidence in, the CJS was maintained and that quality standards were kept high in the face of a growing market and increased competition. Home Office ministers have agreed that this function should be discharged by a newly created office of 'Forensic Science Regulator' within the Home Office. Most would agree that there is a need for some form of monitoring and regulation of the FSS, but how is it envisaged that the new Forensic Science 'Tsar' will achieve this? The Home Office says that the role of the Regulator will be:

- to establish, and monitor compliance with, quality standards in the provision of forensic science services to the police service and the wider CJS
- to ensure the accreditation of those supplying forensic science services to the police, including in-house police services and forensic suppliers to the wider CJS
- to set and monitor compliance with quality standards applying to national forensic science intelligence databases, beginning with the National DNA Database and the National Ballistics Intelligence System, and extending to others in due course
- to provide advice to ministers, CJS organisations, suppliers and others as seems appropriate on matters related to quality standards in forensic science
- to deal with complaints from stakeholders and members of the public in relation to quality standards in the provision of forensic science services.

However, it seems that the Regulator will not be expected to deliver on all of these requirements personally. Instead, he will merely ensure that:

- the required standards exist
- they are fit for purpose
- they are subject to accreditation, and
- they are monitored.

Where there are existing organisations already performing some of these functions, the expectation will be that they will continue to do so. The Regulator will 'operate through the established processes unless these are unable, for some reason, to deliver the required outcome'. It is hardly surprising, then, that the Regulator's primary role will be not so much to 'regulate' as to monitor performance and enforce quality. As with so many other such schemes, the exercise is one designed partly to boost public confidence in the FSS and the CJS, both of which have attracted their fair share of criticism in recent years.

Following interviews held in October 2007, an appointment has been made. The Home Office is to announce the happy incumbent in November, hoping to have its first full-time Regulator in post by January 2008. In the meantime, Adrian Cory is acting as the Interim Regulator.

...and a quango to boot!

It should also be noted that there is to be yet another quango created. Its function will be to assist the Regulator in carrying out his duties. This body will be known as the Forensic Science Advisory Council (FSAC) and will support the Regulator by considering and offering advice on a dizzying list of matters related to the Regulator's work, including:

- the setting up of, and monitoring of compliance with, quality standards
- the accreditation of those supplying forensic science services to the police
- the quality of academic and educational courses in forensic science.

But will it make any difference to public confidence?

There appears to have been little, so far, by way of consultation. We are told that the Home Office has already drafted proposed terms of reference for the FSAC and any expert groups required to address the initial work programme. The Home Office will, however, publish the list of members with contact details, and will also publish meeting agendas in advance so that interested parties will have the opportunity to contribute to issues under discussion. They have also set up a forum of 29 stakeholders to advise the Interim Regulator, and a Stakeholder Conference is planned to take place on 23 January 2008. It seems, however, that this is to be a fairly exclusive affair, with numbers strictly limited and attendance by invitation only!

Court digest

When is a fact not a fact?

The role of an expert is, of course, to assist the court by presenting an expert opinion drawn from the given facts in a case. It will generally be a matter for the expert's discretion to decide:

- which facts are relied upon in reaching that opinion, and
- which facts are considered and subsequently rejected as being unreliable or not pertinent to the issues in question.

Provided the expert identifies those 'facts' considered to be insufficiently reliable and states his reasons for taking this view, then he will generally be free to make his findings based on whatever is seen as the essential, verifiable evidence. Depending on the weight given to other factual evidence, the expert might feel the need to qualify his opinion to encompass a range of views. These may be assigned varying probabilities according to:

- the expert's judgement and
- the weight of the evidence supporting that probability.

The facts in a case are, of course, usually issues in dispute. Take, for example, child custody or contact proceedings. Where one parent alleges that the other has abused a child and seeks to oppose that parent's application for contact, the question of abuse will frequently be a key issue to be decided, often with the assistance of expert evidence. By examination and interview of the child and by considering statements made by the parents and/or others, the expert will form a view as to whether abuse has taken place and by whom. The court will then attach such weight to this opinion as might be appropriate having regard to other evidence that might conflict with or support this view.

But how free are experts to weigh the evidence for themselves and how far are they obliged to take notice of the findings of others? Where, for example, there has already been a finding made on the same facts by a previous court, are experts bound to accept that finding or are they free to depart from it when forming their own view?

This was precisely the question faced by the court in *Re J. & Another*[1]. The case involved an application by a mother for contact with her two children, J and O. There had been a previous hearing in different but related proceedings when the court had made a finding on the facts in relation to whether there had been harm to the children. In the subsequent application for contact, an expert had been instructed who came to a conclusion that differed from that reached by the previous court.

In rejecting the expert's evidence, Judge Cahill QC said that it was not within the role of an expert to decide whether to accept the findings of fact of a judge. Acknowledging the important role played by experts, she said that the court relied heavily on their assessments and opinions. It was, said Her Ladyship, part of an expert's role to evaluate objectively the information given. Often an expert was faced with trying to make sense of differing accounts and reporting to the court on a preliminary or limited basis until the facts were determined. However, Judge Cahill was firmly of the view that, in such circumstances, there could be no greater assistance given to an expert than a judgment of a High Court judge in which findings of fact had been made after a full hearing. Those were, she said, facts upon which the expert could rely.

Experts are not responsible for determining 'facts'

Experts must be free to dissent

It appears to us that in taking this view Judge Cahill may perhaps have overstated the matter. Surely an expert should remain free to reach his own conclusions on the facts regardless of the previous findings and no matter how eminent the finder? Were this not so, then cases would never be overturned on appeal by the demonstration of an error in expert evidence or, indeed, an erroneous fact.

It must be acknowledged, however, that an expert is not appointed as a determiner of the facts of a case. He merely offers an expert opinion drawn from those facts. And it is important to separate the role of the expert from that of the court. The court is the final arbiter of fact and makes its decision following a proper determination of those facts. If the expert thinks that the facts are not as stated, then he must highlight this and state the reasons for his view.

It appears that part of the problem in this case, and a major reason for rejection of the expert's evidence, was his failure to refer in his report to the findings made by the court in the previous hearing. Had he done so, then in our view it is likely that Her Ladyship would have delivered her judgment a little less vehemently. It is telling that, when giving reasons for her decision, the judge said that where an expert failed to mention and accept a series of findings made at a court hearing, it made his evidence completely unreliable and also raised the question of his status as an expert witness.

Although at first sight the judgment appears to suggest that an expert is not at liberty to depart from the finding of a previous court, it appears to us that the key here lies in the 'failure to mention' rather than the 'failure to accept'.

Experts should refer to 'facts' determined in earlier hearings

Compounding errors

This case brings to mind the distorting effect that the court's method of fact finding can have. It was first highlighted in discussions held at a *Society of Expert Witnesses* conference.

The distortion is particularly troubling because it can lead the court to make its judgment in a way that is alien to the scientific method. A simplified example my help to demonstrate.

In a civil case the standard of proof is on the balance of probabilities. So, if an expert claims

How reliable is the court's fact-finding process?

there is a 0.6 probability that a given event occurred, and the court accepts that opinion, for the purposes of the proceedings that event is assumed to have actually occurred, i.e. the probability collapses to 1.

The problem arises in the sequential fact-finding process the court employs. Let's assume there are four independent events which together would prove the case for the claimant. These are determined by an expert to have the following individual probabilities of having occurred:

Event	Probability
A	0.60
B	0.75
C	0.80
D	0.90

If the court accepted the opinion of the expert it would make a finding of fact that each event took place, assign each a probability of 1, and find for the claimant. However, the scientific approach would be to multiply the individual probabilities and conclude that there was a probability of only 0.324 that all four events occurred. As this is less than the 51% required in the civil court, the defendant would win.

Clearly, one is seldom able to assign accurate probabilities to the kinds of events in dispute in civil court cases. Furthermore, having four completely independent events will also be pretty rare. Nevertheless, the distorting potential inherent in the court's approach is real, and we would be interested to hear from any expert who has evidence of this distortion in practice.

Fresh expert evidence as a ground for reopening a final appeal

Once there has been a final determination of any appeal (which includes an application for permission to appeal) it is not normally possible for a party to reopen it. There is, however, an exception to this rule and it is found in CPR 52.17. The rule states at paragraph (1) that the Court of Appeal or the High Court will not reopen a final determination of any appeal unless:

Failure to adduce expert evidence can't reopen the litigation

(a) it is necessary to do so in order to avoid real injustice;

(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

(c) there is no alternative effective remedy.

One of the grounds that is often put forward when making an application under rule 52.17 is that fresh evidence is available which, if not heard, will lead to injustice. In deciding whether to allow such an application the court is required to consider what constitutes fresh evidence and also weigh its merits and importance and how much influence it might have had on the decision of the court had it been available at trial.

In *Bassi -v- Anas*[2] an application was made under CPR 52.17 to reopen the final determination of the applicant's permission to appeal in possession proceedings. The ground for the application was that there was fresh expert handwriting evidence which had not been before the judge at trial.

The case involved a dispute between a landlord and a tenant. The landlord had served notice seeking possession of the property on grounds of rent arrears. Possession was claimed on the basis that the property had been let on an assured shorthold tenancy and the landlord relied on notices served under ss. 8 and 21 of the Housing Act 1988. The tenant denied that these notices had been properly served on him and also denied that he had been in arrears with his rent. Moreover, he claimed that the original tenancy had been superseded by a 12-month tenancy agreement (which was not in dispute) which had later been converted into a 36-month tenancy. On this basis he argued that the landlord was not entitled to summary possession of the property. The Landlord denied that the tenancy term had been extended to 36 months and claimed that the supporting documents produced by the tenant were forged.

In a consolidated hearing of the action, the trial judge had found in favour of the landlord on a number of issues. He had, particularly, found that both notices had been properly served on the tenant and had declared that he found the landlord's evidence to be the more credible of the two. He had concluded that, in view of his decisions on other matters, it was not necessary to determine the length of the tenancy term. He had gone on to find, based on the evidence, that the landlord had not signed the amended agreement. The implication was that this must have been forged by the tenant or some other person. The tenant's application to appeal was refused on the ground that the tenant was unable to show that the judge had been clearly wrong in his finding of fact. It was only at this point that the tenant instructed a handwriting expert to examine the disputed document. The expert's finding was that the landlord's signature on all of the documents had been penned by the landlord.

In light of the expert's unequivocal findings, the tenant applied for the refusal of permission to be reopened and reheard. He submitted that the expert's report constituted new evidence. He said that he had not obtained this earlier because, at the time of the original hearing, he had been unable to afford it. Had the expert evidence been available earlier, different findings of fact would have been reached.

In deciding whether the handwriting evidence should be admitted, the Court of Appeal said that it was necessary to determine whether that

evidence could have been obtained with reasonable diligence for use at trial.

In this case, the tenant had known from the outset that the landlord's signature was in issue. The original document had been in the tenant's possession and it had always been open to him to have it examined and to perform any tests thought necessary. It was acknowledged that there had been an earlier application in the trial for an adjournment to allow the tenant to have the document examined and that application had been refused by the trial judge. However, there had been no attempt by the tenant to appeal against that decision and neither had he taken any steps towards obtaining sufficient funds to instruct an expert.

In addition, there were other authenticity issues, aside from the landlord's signature. The landlord had always maintained that if it was, in fact, his signature on the document, then it must have been taken from an earlier draft or obtained by deception. It was always his case that the witness's signature was the forgery. Consequently, it could not be said that the landlord had succeeded at trial on the basis of his own forgery and it could not confidently be said that the expert evidence the claimant sought to adduce would have had an important influence on the outcome.

In refusing the application, the Court of Appeal made it clear that the mere fact that fresh expert evidence had not been before the trial judge did not mean, in itself, that it would qualify under rule 52.17. The evidence had always been available to the tenant, had he wished to obtain it, and it could not be said that the circumstances here were 'exceptional' within the meaning of the second head of the rule. Neither could it be said that the first head had been satisfied as, having regard to the cases of both parties, there could be no certainty that the evidence would have weighed heavily in determining the outcome of the case or that refusal to admit it would lead to an injustice.

Failure to disclose expert's report was a breach of natural justice

Reliance on expert evidence at court does, of course, require that such evidence has been properly disclosed and both sides have an equal opportunity to address the matters within it. However, where decisions are taken by a statutory body, government department or local authority on the strength of expert opinion, does the party affected by that decision have a right to disclosure? This was the question posed in *R. (on the application of A) -v- Liverpool City Council*[3].

The claimant was an Afghan national who had arrived in the UK seeking asylum. He claimed to be 14 years old and, accordingly, he had asked to be fully supported by the local authority. However, social workers had assessed his true age as being 17, with the result that the local authority was only supporting him to the extent appropriate for a person of that age. The claimant had sought legal advice and his solicitors had instructed a consultant paediatrician. The expert reported that, having regard to corporal traits, including dental progression and psychological characteristics, the applicant was, indeed, aged 14 years. The claimant was then, at the request of the local authority, examined by a dental specialist. His solicitors specifically requested that, if the dental examination was to be used for the purposes of age assessment, then it should be forwarded to them for consideration. The dental surgeon's report concluded from the claimant's dental progression that he was an adult. Acting on this report, and without informing the claimant's solicitors of its content, the local authority withdrew him from the support of children's social services and removed him to a centre for adult asylum seekers.

The claimant applied for judicial review of the decision that he was an adult and sought declarations from the court that the local authority had acted unfairly and had erred in not giving him an opportunity to address matters relevant to the local authority's decision. Following issue of the judicial review proceedings, the local authority undertook to return the claimant to his previous accommodation pending the outcome. Further reports were obtained from both the paediatrician and the dental surgeon as expert witnesses as to the probable age of the claimant. The local authority maintained its view, after receiving a second report from the dental surgeon, that the claimant was an adult. However, the claimant argued that, in treating the dental surgeon's opinion in relation to his dental progression as determinative of his age, the local authority had failed to take into account a wider range of determinative factors and had acted unreasonably.

Giving judgment for the claimant, the court said that it was appropriate to grant a declaration stating that the local authority's first decision was unfair because it had deprived the claimant of an opportunity to make representations. The local authority's blatant failure to supply a copy of the dental expert's report, in spite of the specific request they had received, was in breach of natural justice. The local authority's second decision, which had followed the obtaining of the second report, was also quashed on the basis that the analysis deployed by the dental surgeon failed to adequately address variables that were indicative that the claimant's dental progression might not correlate with his chronological age. Accordingly, even though the initial decision had been superseded by the second decision, it was appropriate to grant the declaration sought by the claimant.

Dental assessment of biological age alone was not enough

References

[1]*Re J. & Another (Children: Contact). Fam Div. The Times August 17, 2007.*

[2]*Bassi -v -Anas* [2007] *EWCA Civ* 903.

[3]*R. (on the application of A) v- Liverpool City Council* [2007] *EWHC* 1477.

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Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 55). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, privilege, disclosure and fees. When you need clarification, the Factsheets should help. If not, call us for assistance on 01638 561590.

Court reports – FREE

Accessible freely on-line at **www.jspubs.com** are details of many leading cases that touch upon expert evidence.

LawyerLists

How would you like to have a database of 10,000+ litigation lawyers at your fingertips? Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Now you can have fast, easy, flexible and cost-effective access to top-quality address data for litigation lawyers. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version of the logo is also available bearing the year of most recent recommendation. Successful re-vetting in 2008 will enable you to download the 2008 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for assistance, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2008 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, experts may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
- a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers experts the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training achievements, publishing record, etc.

Photographs – FREE

Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photograph?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

Multiple entries

As well as saving you money, multiple entries offer improved geographical and expertise coverage for multi-site firms. If your company has several offices around the UK combined with a wide range of expertise, call to discuss the options.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Surveys and consultations – FREE

We bring together the largest community of expert witnesses in the UK. Since 1995, we have tapped into this community, through our survey work, both to build up a body of statistics that reveal changes over time and to gather data on areas of specific and topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

Professional advice helpline – FREE

A valuable benefit for those experts who opt for the Professional service level is our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment and commercial legal issues.

Software

Drawing on over 20 years' experience of working with the expert witness community, we have designed a suite of task-specific software modules to help keep experts informed.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
www.jspubs.com

Editor
Dr Chris Pamplin

Staff writer
Philip Owen