Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

Family Justice Review

The Family Justice Review was asked to consider the whole of the family justice system in England and Wales, and on 3 November 2011 it published its final report.

In relation to expert witnesses, it concludes that **expert evidence is often necessary to a fair and complete court process**. But growth in the use of experts is now a major contributor to unacceptable delay. To ensure that the child's timescales exert a greater influence over the decision to commission expert reports, it is calling for **primary legislation to reinforce that regard must be given to the impact on the welfare of the child of delay** in commissioning such a report.

The report goes on to say that the **court should seek material from an expert witness only when that information is not available from parties already involved** in proceedings. Independent social workers should be used only rarely, and research should be commissioned to examine the value of residential assessments of parents.

Judges must direct the process of agreeing and instructing expert witnesses as a fundamental part of their case management role. Moreover, **judicial control needs to be exercised over letters of instruction**. Amen to that!

Noting that experts are too often not available, and the quality of their work is variable, it calls for the Family Justice Service to work with the Department of Health and others to **improve the quality and supply of expert witness services**.

The **Legal Services Commission** (LSC) is criticised for not knowing what it pays expert witnesses. The report urges the LSC to collate such data on a case by case basis as a matter of routine. The report also states that a further pilot of **multi-disciplinary expert witness teams** is needed that fully engages the NHS before the role of such evidence by committee can be assessed properly.

What's more, the report asks whether the Family Justice Service can consider **paying experts directly**. It also reports that it is too early to conclude whether the recent 10% reduction in expert witness rates will have an effect on the **supply of experts**, but it recommends that the Government monitors this closely.

We will be considering this important report in more detail and will report back to you further in a future issue.

Scottish civil reforms

In February 2007 the then Minister for Justice, Cathy Jamieson, asked the Lord Justice Clerk, the Rt Hon Lord Gill, to undertake a wide-ranging review of the civil courts system in Scotland. In 2009, the final report proposed a package of structural and functional reforms to address the problems identified in the Scottish system. These include compulsory pre-action protocols in personal injury cases, increased use of IT in the courts, a new case management model and a simplified procedure for claims under £5,000. Gill also proposed structural reform of the court system, including an increase in specialist sheriffs, an overhaul of judicial review litigation and a specialist procedure for multi-party actions.

Most interesting of all, Gill recommends that a Scottish Civil Justice Council be set up to replace the rules councils of the Court of Session and Sheriff Courts. Its remit would be to keep under review the provision of civil justice by the courts in Scotland, including matters such as the structure of the courts, their jurisdiction, procedures and working methods, and the cost of litigation. The Civil Justice Council for Scotland would monitor the implementation of the Gill Report; receive representations and proposals for reform; have the power to commission research; and keep abreast of reforms and developments in other jurisdictions. Gill argues that in this way, reform and improvement of the civil justice system would be an ongoing process. Does anyone else hear echos of a Woolf in all that?

Now, the Scottish Government has launched a consultation on this element of the Gill Report. The Scottish Government says 'The creation of a Scottish Civil Justice Council would be key to implementing the report's recommendations, which represent the greatest programme of Scottish civil courts reform in a century. There is currently no single body or person with the strategic overview, capacity and authority to undertake these tasks. It is proposed that the new body should take over, and expand upon, the functions of the current civil rules councils.' Visit *www.scotland.gov.uk/Publications/ 2011/09/ 28125601/0* to have your say.

New edition of the Register

Preparations for edition 25 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in 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 that we can make appropriate alternative arrangements.

Season's greetings!

Everyone here at J S Publications sends their best wishes to you for a Happy Christmas!

Dr Chris Pamplin

Inside

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Reports in unrelated proceedings

What is the real reason behind requesting disclosure?

There are a number of reasons why a party not involved directly in proceedings might wish to have access to an expert witness report. Two recent cases in the Patents Court have examined different aspects of this.

Expert reports in foreign proceedings

It might sometimes happen that the substance of a case has already been tried in a foreign court on the same or similar facts. Whilst that circumstance might be pleaded and the foreign case cited in argument, a party may wish to have access to the technical data upon which the foreign case was decided – most notably, any expert witness report that was laid before that foreign court.

In *Abbott Laboratories Ltd -v- Medinol Ltd*[1], the claimant sought disclosure of expert witness reports and related documents that had been produced in the courts of the United States. The complainant was seeking revocation of three UK patents for medical stents. These were part of a family of similar but not identical patents, some of which had been the subject of the litigation in the US.

In the UK proceedings, the respondent had instructed an expert witness to give evidence relating to the construction of certain scientific terms contained in the UK patents. The expert witness had also given evidence in the US proceedings. There was a dispute as to the definition of the terms ascribed by the expert witness in the UK proceedings. For that reason, the complainant wished to have sight of the reports prepared by the expert witness for the foreign court, the inference being that these might differ from the report prepared in the UK. The respondent resisted disclosure as being unreasonable and disproportionate as it could involve many thousands of documents.

The complainant had originally sought disclosure of '*all evidence, whether in trials, depositions and arbitrations, and whether by statements, expert reports or transcripts, in prior litigations, arbitrations, patent office proceedings, or other proceedings relating to the Medinol patents and all corresponding patents, whether in Europe or elsewhere, including the United States*'. However, the request was subsequently narrowed to four specific US cases, the reason being, said the complainant, that one or more of the disputed terms also appeared in at least one of the claims of the patents in issue in the US proceedings.

Will the report be admissible under UK jurisdiction anyway?

The respondent argued that the specific terms in issue had been accepted by both parties' expert witnesses not to be '*terms of art*'. It was further argued that the expert reports, depositions and trial transcript documents sought would amount to a very substantial number of documents that were likely to run to 15–20 lever arch files. However, in addition to these documents, and in order to understand them properly, it would be necessary to consider them in the context of further documents, such as the opposing side's evidence and exhibits, the relevant pleadings, written submissions and records of all arguments and submissions. It would also be necessary to consider the application of the law under which the various cases and arbitrations were decided.

The volume of these documents and the time it would take to gather them together would make complying with the order sought an extremely costly process. Moreover, those costs would not stop with disclosure because the documents would have to be read by both the complainant's and the respondent's UK teams, which would result in a significant further increases in cost. For that reason, it was submitted that the disclosure sought was neither reasonable nor proportionate.

Refusing the disclosure application, Kitchin J held that the interpretation of the patent terms was ultimately a matter for the court and a question of UK law. Whilst the court would, of course, admit evidence as to the meaning of technical terms, in this case, the particular terms relied upon were not said to be terms of art. Second, the proceedings before the US courts must necessarily have involved different stents and been decided according to different substantive and procedural laws. Third, the complainant was, in the judge's view, clearly concerned to consider the expert evidence given in the other proceedings with a view to seeking to identify some inconsistency between that evidence and the evidence given in the UK action. However, no such inconsistency had come to light hitherto and the judge's attention had not been drawn to anything that might indicate such inconsistency. Moreover, Kitchen J was extremely doubtful that some of the evidence given in the expert witness's US report was admissible in the UK jurisdiction in any event.

Third party access to reports on the court file

Another recent case in the Patents Court dealt with third-party access to copies of documents from the court file of an action that had already been settled by the parties.

In *Pfizer Health -v- Schwartz Pharma AG and Strickland (applicant)*[2], the High Court allowed a third party access to documents, including an expert witness's report from a concluded case in which the third party had not been involved.

The rules governing access to statements of claim and other documents on the court file is governed by the Civil Procedure Rules (CPR), but there are distinctions between claims filed before 2 October 2006 and those filed after that date.

Statements of case filed prior to 2 October 2006 are governed by the former rules 5.4(5)–5.4(9), which are now set out in the Practice Direction to Part 5 at paragraphs 4A.1–4A.9.

So far as documents other than statements of case are concerned, including expert witness reports on the court file, the position is governed by CPR 5.4C(2), whether or not it was filed before or after October 2006. The rule states:

'A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.'

There is no unfettered right of access to the court file other than in accordance with the above rules and practice directions. It has always been necessary to identify the documents or class of document in respect of which permission is sought and the grounds relied upon. The main reason given by the courts has always been that access to court files is one of the principles of open justice, and that this is necessary to monitor that justice is done.

In the *Pfizer* case, however, there was an obvious commercial reason for requesting access. Indeed, on the face of it, it had very little to do with open justice. Furthermore, the original parties had compromised the case by an agreed settlement some years earlier and without any final judicial ruling on the matters in dispute.

A commercial reason to seek disclosure

The third-party applicant was a firm of solicitors acting for a company active in the technology area. The company wanted to determine its freedom to act and the stance Pfizer would be likely to take if a patent was challenged. Initially the application was for an order that they be supplied with 'all allowable documents' from the court records pursuant to CPR 5.4C.

The application came before a Master, who provided the applicants with copies of the claim form and the amended claim form, together with copies of four consent orders and a copy of an order for directions. The application was then adjourned so that the comments on whether further documents should be disclosed could be obtained from the original parties to the action.

The claimants' solicitors confirmed that their clients would not object to the application if it was limited to documents currently on the court file, which they had themselves inspected, as they were entitled to do without permission. The defendants' solicitors consented to the provision of any non-confidential documents that were on the court file. The application then came before Floyd J.

The Judge considered that the application requesting 'all allowable documents' was improper because it did not adequately identify the document or class of document sought. It also failed to identify the grounds on which the request was made. However, the applicant was permitted to remedy this by clarifying that his application was concerned with documents which 'related to the validity of the patents in suit' and specifying the exact documents or classes of document concerned.

One of the classes of document the applicant wished to see were those that related to experiments carried out by Pfizer. It appeared from the judgment on the summons for directions that Pfizer had performed experiments directed at supporting the validity of the patent, but the Notice of Experiments was not on the court file. The court papers relating to that summons included a witness statement from Pfizer's solicitor, who explained that the experiments in question were based on material that had already been filed in the European Patents Office (EPO) in connection with an opposition to one of the patents in suit. He exhibited to his witness statement the material filed in the EPO.

The application was also supported by an expert witness to whose report were annexed publicly available documents referred to in his report. It was reasonable to assume that these witness statements were read by or to the court on the application for directions, so there was a presumption in favour of allowing copies to be taken. The applicants had a legitimate interest in having copies of the witness statement and expert witness report because they had a bearing on the validity of the patent in question and would help the third party to understand the stance that Pfizer might take if the patent was to be challenged again.

The court ordered that the applicant should be permitted to obtain copies of the specified documents from the court records. It acknowledged that the applicant had a commercial interest and that the purpose of the application was not to monitor that justice had been done. However, taking a liberal approach, the judge said that where the purpose was not to monitor that justice was done, but the documents had nevertheless been read by the court as part of its decision-making process, the court should lean in favour of disclosure if a legitimate interest could still be shown for obtaining the documents. He qualified this by stating that in circumstances where the principle of open justice was not engaged at all (for example, where documents had been filed but not read by the court), the court should give access only where there were strong grounds for thinking that it was necessary to do so in the interests of justice.

No cheap shortcut to access

However, the judge made it clear that the procedure under the CPR should not be used as a shortcut or alternative to an interested party making a search and obtaining documents from other sources where these were publicly available. There was no reason why the applicants should obtain from the court file any of the voluminous publicly available material exhibited to the statements. CPR 5.4C(1) drew a distinction between statements of case and exhibited documents. The procedure under the CPR should not in general be used to obtain copies of documents that were available from public sources, such as the IPO or the EPO.

Court can permit non-party access to expert reports on the court file

Disclosure can be granted on pure commercial grounds

Reference

[1] *Abbott Laboratories Ltd -v- Medinol Ltd* [2010] *EWHC* 1731 (*Pat*).

[2] *Pfizer Health AB and Anor -v- Schwartz Pharma AG and Ors* [2010] *EWHC* 3236 (*Pat*).

Kaney fallout

Expert blamed for undersettled claim

In his judgment in *Jones -v- Kaney*[1], Lord Philips said: '*I doubt whether removal of expert witness immunity will lead to a proliferation of vexatious claims. I am not aware that since* Hall -v- Simons *barristers have experienced a flood of such claims from disappointed litigants.*' Leaving to one side the fallacy that expert witnesses and barristers are in an analogous position (see *Your Witness* 64), we are keeping a weather eye on the courts to see if the fear of increased litigation against expert witnesses, whether or not vexatious, amounts to any more than a trickle. Two such cases follow.

In need of care

Warner -v- Penningtons[2] is an appeal case arising in the context of a professional negligence claim brought by Mr Warner against Penningtons, the firm of solicitors that represented him at the time of settlement of a personal injury claim. Warner alleges that his claim was settled at too low a level as the result of negligent advice by Penningtons.

Mr Warner suffered a severe head injury while at work in 1993 when he was struck by a heavy plank. He instructed a solicitor to bring a claim. Liability to compensate him was soon admitted on behalf of the employer. The medical evidence showed that Mr Warner had made a remarkably good physical recovery from his injuries but he was left with residual changes of personality and loss of executive function. Although within about 3 years of the accident he was managing to live alone in a flat in London, he was not coping well and it was thought that some professional support might be required in the long term. Accordingly, in 1997, an expert witness report was prepared assessing and costing Mr Warner's care needs, past, present and future.

Based upon reviewing the bundle of medical reports, some witness statements and consultations with Mr Warner and his main care giver, the expert witness wrote her report in March 1998. There is no criticism of the thoroughness of the report's preparation or the expert's general competence or care. On receipt of the report, the solicitor was plainly delighted. He wrote to thank the expert in glowing terms. He said that the report was admirable and explained the care needs very clearly.

Loss of immunity meant detailed defence required

In May 1999, an experts' meeting was convened the day before the hearing and a joint schedule of figures was prepared, some of which the experts agreed, some of which they did not agree. Both experts noted in the statement that it was some time since they had seen Mr Warner and so they had relied upon their earlier assessments. At the court door, the claim was settled for £425,000.

Subsequently, it was alleged that the settlement had undervalued the claim by more than £1 million, the major portion of which was due to the undervaluation of Mr Warner's care needs. A claim was begun against Penningtons.

The care expert was approached by Mr Warner's new legal team and shown various medical reports and witness statements she had not seen at the time. She gave a witness statement saying that her assessment would have been higher if she had seen these papers, and pointing out a passage in her original report where she advised that a care regime should be established 'as a matter of priority'. She had recommended that this should comprise regular cleaning help, a support worker and a case manager. She had in mind that establishing a care regime immediately would reveal Mr Warner's true requirements more accurately than her theoretical assessment could achieve.

In their defence, Penningtons denied negligence and denied the claim had been settled for too little. But, if it had been undersettled, that was due to the expert's negligence in failing to advise that a support worker and case manager should be employed prior to the trial. The expert responded to this by saying this advice had been given in her report, under the heading 'Future care until funds are available to purchase additional assistance', as follows:

> *'Mr Warner's quality of life will have reduced without regular support and funds should be made available as a matter of priority to ensure that a new care regime can be established.'*

It was argued that the expert had done all that could reasonably be expected in her capacity as a care expert to advise the solicitor of the need for a care regime to be set up before the trial. She was entitled to assume that the solicitor would realise that he ought to obtain an interim payment straight away and employ a case worker and support worker. It was not the expert's job to chase him up to see whether he had done it. For Penningtons, it was argued that the words were not such as to convey to the reader that the expert was advising that the care regime should be set up immediately. Any reasonable solicitor would have understood the words to mean only that a care regime would have to be set up after trial or settlement.

An application was made to have the claim against the expert struck out on the ground that she was immune. That issue was stayed pending the decision in *Kaney*. In the alternative (should immunity be lost, which it was), summary judgment was sought on the ground that Penningtons had no prospect of showing that the expert had been negligent.

The application for summary judgment came before the court in July 2010 and summary judgment was given in favour of the expert. Penningtons appealled that decision to the Court of Appeal.

What the words mean

At the Court of Appeal, Penningtons argued that the matter should go to trial because the true

meaning of the contentious words could only be revealed in context, and that context required the hearing of evidence. It was asserted that the solicitor and barristers concerned had not understood the text to mean that the care regime should be set up ahead of the trial, but that one should be set up after the trial.

Lady Justice Smith said that the question to be addressed was: What would a reasonable solicitor have understood from the words used by the expert? This must be decided *objectively* by the judge. It matters not how the solicitor or barristers understood it at the time,

> *'... the question of meaning is to be determined objectively and not by reference to the subjective opinions of those who read it at the time'.*

Taken in the context of the original proceedings, the assumed capabilities of the various people and the matters the writer and reader of the report must be taken to have known, LJ Smith was in no doubt that it was impossible to construe the words used by the expert in any way other than to be advising that funds should be available to set up a care regime ahead of the trial. Accordingly, the Court of Appeal rejected Penningtons' appeal against summary judgment.

So, this is a case in which, because of *Kaney*, the expert had to put forward a detailed defence rather than being able to rely on immunity to deflect the action. It also, helpfully, reminds us that the test for what particular words mean in an expert's report is not based on the subjective impressions of the lawyers who read it at the time, but on a cold, hard, objective analysis by a judge. Thank goodness for that!

The case of the forgetful surveyor

Ridgeland Properties -v- Bristol City Council[3] was an appeal against the decision of the Upper Tribunal (Lands Chamber), formerly the Lands Tribunal, determining the compensation payable for the compulsory purchase of a tower block in Bristol at the sum of £4.5 million.

The single ground of appeal was that the Tribunal wrongly refused Ridgeland Properties' application, made following publication of the Tribunal's draft decision, to re-open the hearing to permit further evidence to be given of three letters making offers of between £15.3 and £23 million for the property.

The brief facts were that Tollgate House, a 19-storey office building, was constructed in 1976 on the north-eastern periphery of Bristol city centre. It was acquired by Ridgeland Properties in 1999 with the intention of converting it to residential use. It was then included in Bristol City Council's (BCC) Broadmead Expansion Compulsory Purchase Order 2003, which was made in November 2003. After various legal skirmishes, BCC took possession on 13 September 2005 and Tollgate House was subsequently demolished.

Ridgeland Properties claimed compensation. The parties were unable to agree the amount of compensation payable, and BCC lodged a Notice of Reference with the Lands Tribunal (as was). Because there were no equivalent property sales available to permit a comparison valuation, it was agreed that the valuation would have to be on the residual basis (a complex, multifactorial approach to determining a value). Using this approach, Ridgeland's expert put the value at between £15 and £23 million, whilst BCC's expert put the value at £2.4 million at best. On 3 June 2009 the Tribunal issued its immensely detailed draft decision, running to 90 pages, valuing the property at £4.5 million.

Meaning of words is objective and for the judge to decide

It is fair to say that the two sides to the dispute had not got along well. Commenting on the inefficiency this caused, the Tribunal said:

> *'... we were not helped in our task by the seeming inability of the parties to agree upon a common approach to some aspects of the costing and valuation processes... . On future occasions we would hope that the respective experts of all disciplines in a reference such as this will be able to agree upon a larger number of variables at an earlier stage without, as here, pursuing an attritional battle of details which descended to the farcical level of the council specifying the cost of, inter alia, shaver sockets on a scheme costing over £40m.'*

But matters were about to descend to the farcical once again. Two weeks after the draft decision was published, Ridgeland's solicitors wrote to the Tribunal to seek permission to introduce three letters from prospective purchasers of the property and for the Tribunal to review its determination on the compensation payable. BCC objected. Ridgeland changed solicitors.

The detailed statement that Ridgeland's new solicitors put to the Tribunal set out the following points.

- There was, in fact, valuable comparative evidence of the property's value through three offers made during 2002/03.
- One offer was for £19.5 million, another for £23 million conditional upon certain planning consents being granted and a final offer for £20 million, again conditional on planning consents.
- These letters were sent to a director of Ridgeland's parent company.
- Ridgeland's surveyor, and valuation expert witness, had seen the offer letters.
- Ridgeland's original legal firm had seen the offer letters.

Naturally, the new solicitors asked why no one had brought these letters to the attention of the Tribunal. Their enquiries revealed:

- the barristers were not aware of the offers
- the solicitors did not respond, and
- the expert was aware of the offers but had forgotten them in preparing his evidence!

Another failure to refer to critical evidence

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Ability to sue the expert informs the court's decision

However, because the offers had been part of the evidence produced to resist the original compulsory purchase order, BCC and its expert surveyor also knew of the offers.

Finally, of course, Ridgeland Properties knew of the offers but, according to its parent company, the matter had been left in the hands of its solicitors and expert. The first the parent company knew of the detail was, apparently, when the £4.5 million decision came out of the Tribunal.

Discretion of the Tribunal

The Tribunal has a discretion to admit new evidence. Ridgeland submitted that there was a number of considerations that came into play, some arguing for admitting the new evidence and some against. Against Ridgeland was:

- the fact the letters had been known to them throughout and so, to paraphrase Lord Denning, the evidence could have been obtained with reasonable diligence for use at the hearing, and
- the additional time a new hearing would take.

In favour of admitting the new evidence was, they argued:

- the cardinal importance of the new evidence
- the fact that BCC knew about the offers but didn't refer to them in evidence
- that *Stanton -v- Callaghan*[4] would prevent Ridgeland seeking redress through a negligence action against their expert
- the inherently unfair nature of compulsory purchase which argued for a more flexible approach in order to balance the public interest in the land and the landowner's rights
- the fact that it was a local authority paying the compensation
- that Ridgeland accepted it would pay the costs of the resumed hearing, and
- 'the sense of injustice and absence of fair play now felt' by Ridgeland.

The Tribunal wasn't persuaded:

> *'The fact is that at all material times the evidence of the letters was available and, if it had been considered relevant, could have been adduced. It was not adduced and it seems to us that it would not serve the cause of justice for such evidence to be admitted at this late stage, following the publication of our decision. It is incumbent upon a party to adduce such evidence as he considers relevant and persuasive relating to the findings of fact which the judge may make. He cannot wait for the findings and then say "Oh well, I could have called more evidence on that point."'*

At the Court of Appeal

Having failed to get the Tribunal to admit the offer letters, and, in effect, change the whole basis of the valuation from a residual to a comparative one, Ridgeland turned to the Court of Appeal. In granting permission to appeal, Sullivan LJ said that it was arguable that in a compulsory purchase case, where the local authority had a duty to pay the correct (not the lowest possible) compensation, knowing of the offer letters the local authority should have drawn them to the attention of the Tribunal. BCC could then have argued why they didn't change the valuation.

The Court of Appeal made it clear that the only ground for overturning the Tribunal decision was that the Tribunal had wrongly refused to admit the offer letters. Much of the Court's reasoning is founded in an analysis of whether, in the particular circumstances of a compulsory purchase case and a party who, leaving the conduct of the case entirely up to the legal and expert team, simply 'forgets' about a crucial piece of evidence, deserves a relaxation of Lord Denning's approach to the late admission of evidence. It concluded that it didn't, and crucial to that decision was *Jones -v- Kaney*:

> *'In Jones -v- Kaney the Supreme Court overruled Stanton -v- Callaghan and decided that the immunity from suit for breach of duty enjoyed by expert witnesses in relation to their participation in legal proceedings should be abolished. In our judgment, the ability of the Appellant to obtain redress from [the expert] and/or [the solicitors] if its explanation for the failure to refer to the three offers is correct is a powerful reason, which the Tribunal was not able to take into account, for not permitting the Appellant to mount an entirely new valuation case before the Tribunal.'*

The expert surveyor for BCC had argued, and the Court of Appeal accepted, that at the time (i.e. without the benefit of hindsight) it was reasonable for him to proceed on the basis of not referring to the offers. If Ridgeland disagreed with his assessment that they were irrelevant, their expert would introduce them. The fact they didn't supported his view. It is only with hindsight that his omission seems surprising.

Interestingly, this 'failure to disclose' is similar to the action of Dr Williams in the Sally Clark case, and he was roundly pilloried for his failure to mention what was in his opinion a false-positive medical test. It is also interesting to observe that Ridgeland's expert is criticised for failing to mention evidence *he was not given as part of his instructions*. Perhaps the solicitors will be an easier target than the expert witness for Ridgeland's rage.

Conclusion

So, not 6 months after the *Jones -v- Kaney* judgment, we have two decisions that rest upon it. In *Warner,* the expert witness immunity argument was removed, so requiring a proper defence to be mounted. In *Ridgeland*, the Court cited the loss of expert witness immunity as a critical factor in its decision to refuse to overturn the Lands Tribunal's decision. We'll keep watching developments with interest!

References

[1]*Jones -v- Kaney* [2011] *UKSC* 13.

[2]*Warner -v- Penningtons (A Firm) & Others* [2011] *EWCA Civ* 337.

[3]*Ridgeland Properties Ltd -v- Bristol City Council* [2011] *EWCA Civ* 649.

[4]*Stanton -v- Callaghan* [2000] *QB* 75.

Reports for ex-parties

In multi-party cases, proceedings might involve numerous parties, not all of whom proceed to full trial. This poses a question concerning the admissibility of expert evidence that was prepared for someone who is no longer a party. Can such an expert witness report be relied upon by one or other of the remaining parties? This question was considered by the court in *Cooperative Group -v- John Allen Associates*[1].

The case of the sloping supermarket

The case concerned a dispute over the development of a supermarket site in Kent. The contracts and subcontracts were complex and fairly numerous. The original landowner had engaged a developer for the site. The developer, in turn, instructed a professional consultant (John Allen Associates Ltd) and a building contractor, both of whom gave collateral warranties to the original landowner. The original landowner transferred its rights and obligations to the Co-operative Group Limited (the new landowner) after the project reached practical completion, but before claim forms were issued.

The building works encountered difficulties. The site was on soft clay and the ground needed to be stabilised. The professional consultant recommended a 'vibro-replacement' method and the work was subsequently designed and carried out by the subcontractor by means of vibro-replacement stone columns. A concrete slab was laid, upon which the supermarket was built. However, the concrete slab began to settle to such a degree that the floor of the supermarket acquired a marked slope, and all the parties agreed that remedial works would be necessary to correct the problem.

After lengthy negotiations and correspondence, the parties failed to reach agreement or responsibility for the defect. The new landowner commenced proceedings against the professional consultant, claiming damages for breach of the professional consultant's collateral warranty to the original landowner (upon which the new landowner now relied). The new landowner claimed that vibro-replacement had been an unsuitable method for stabilisation and that the professional consultant acted in breach of the standard of care in its collateral warranty. The professional consultant added the building contractor to proceedings as a third party. The building contractor added the subcontractor to proceedings as a fourth party.

All parties instructed expert witnesses, whose reports were disclosed. Each party expected that their expert evidence would be adduced in evidence at the trial. On the second day of the trial, however, the professional consultant, building contractor and subcontractor settled the counterclaims between themselves and they took no further part in proceedings. Because of this, their expert witnesses could not be called to give evidence in person. However, the new landowner still sought to rely on their expert witness reports during the trial.

Ramsey J considered the admissibility of this and gave the following guidance.

Civil Procedure Rule (CPR) 35.11, headed 'Use by one party of expert's report disclosed by another' provides as follows:

> *'Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.'*

The defendants had argued that the term 'party' here is limited to parties to the claim and does not include counterclaim (CPR Part 20) parties. Ramsey J didn't agree, saying that CPR 35.11 does not prevent parties relying on expert reports of parties that are no longer involved. In a case involving a number of parties, where witnesses have met and exchanged views and the issues which arose were common between the original claim and the additional claim 'it would be unrealistic to draw a distinction between evidence given by the original parties to the claim and those instructed by the parties to the Part 20 claim.'

He also pointed out that, in any event, the court retained the power to control the expert evidence under the overriding objective, and also under its general powers of management under CPR 3.1(2), its general powers to control evidence under CPR 32.1 and its specific powers relating to expert evidence under CPR 35.1. And amongst the court's duties and powers is the need to ensure that, where some part of the proceedings has already been settled, any evidence under CPR 35.11 is restricted to that which is 'reasonably required to resolve the remaining issues in the proceedings'.

Inability to cross-examine reduces weight

In allowing the new landowner to rely on expert reports prepared on behalf of parties that were no longer participating in the trial (including referring to the joint statements), the judge stated that there was no particular requirement for the court to give permission before a party used an expert witness report disclosed by another party as evidence at the trial. However, the fact that the experts themselves could not be cross-examined would mean that the weight given to evidence contained only in reports would be 'much less' than expert evidence that was supported in oral evidence. The weight given to each report was a factor that the court had to decide in assessing the evidence.

Ramsey J also made it clear that the party wishing to rely on the expert witness report could not cherry pick from its contents. Once a report was relied on in evidence, the court must take account of the whole of that report, so far as it was relevant, and a party could not choose which parts of the expert witness report should be given in evidence.

Reports for parties that settle can be re-used by remaining party(ies)

Such reports can't be cross-examined, so less weight given

Reference

[1] *Cooperative Group Ltd -v- John Allen Associates Ltd* [2010] *EWHC* 2300 (*TCC*).

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