Your Witness

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

National Taxing Team

We have had a number of calls on the *Register*'s Helpline recently concerning difficulties getting payment out of criminal courts. These have included a refusal to pay VAT on an expert's bill and a blank refusal to pay an expert witness any professional fees because the magistrates' court didn't make a specific order under Regulation 20 of The Costs in Criminal Cases (General) Regulations 1986.

In such cases, the bizarre behaviour of the (often low-ranking) court official has been overcome by having the matter referred by the court concerned to the National Taxing Team (NTT, search Google for *National Taxing Team*).

The NTT website says that the Team deals with the assessment of discretionary costs claims in the criminal courts, including:

- **orders for costs out of central funds to acquitted defendants, private prosecutors and court appointees** in the crown and magistrates' courts
- **discretionary claims for costs under a Representation Order**, i.e. litigators' claims for confiscation proceedings, and advocates' claims for committals for sentence and appeals to the crown court, as well as breaches of crown court orders
- **discretionary claims under the advocates' graduated fee scheme**, i.e. claims for special and wasted preparation, and fees relating to confiscation proceedings.

But it is the experience of our correspondents that the NTT also deals with questions arising out of payments to expert witnesses. The NTT has offices in Manchester and Birmingham:

- National Taxing Team Manchester Region, 2nd Floor, Lee House, 90 Great Bridgewater Street, Manchester, M1 5JW
  Tel: 0161 233 4840
- National Taxing Team Birmingham Region, 3rd Floor, Temple Court, 35 Bull Street, Birmingham, B4 6LG
  Tel: 0121 681 3262

We have been told by experts that the staff at the NTT are very helpful. If you are having trouble with a criminal court's exercise of its discretion on payments to expert witnesses, it may well be worth talking to them. And, if you have the time, do let me know how you get on because the help you receive may in turn assist other experts in other courts.

SRA Handbook

The first version of the Solicitors Regulation Authority (SRA) Handbook is available online at *www.sra.org.uk*. The SRA Handbook sets out the standards and requirements it expects those it regulates to achieve and observe, for the benefit of the clients they serve and in the public interest. The SRA describes its regulatory approach as one that 'is outcomes-focused and risk-based, so that clients receive services in a way that best suits their needs'. I'm not entirely sure I understand that!

Psychological wizardry

A recent entry on the *bc-injury-law.com* blog made me smile. Apparently, in the 1990s, Duncan Scott, then the New Mexico Senator, became so fed up with psychiatric expert witnesses he proposed this amendment to a State Bill:

> *When a psychologist or psychiatrist testifies during a defendant's competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, a psychologist or psychiatrist shall be required to don a white beard that is not less than 18 inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding a defendant's competency, the bailiff shall contemporaneously dim the courtroom lights and administer two strikes to a Chinese gong.*

The blog reports that Mr Scott tacked this amendment onto a Bill in 1995 and, despite its clearly satirical nature, it passed with a unanimous Senate vote! The amendment was then removed from the Bill prior to receiving House approval so it never did become law.

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If you have a Kindle e-reader, you can now, if you wish, set up your Kindle account to automatically receive *Your Witness* as soon as it is published. All you have to do is:

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With that done, *Your Witness* will automagically appear on your Kindle moments after we publish it each quarter. All very clever if you like that sort of thing!

Chris Pamplin

Inside

Issue 67

March 2012

Family Justice Review

Family Justice Review final report published

In *Your Witness* 66 we introduced the final report of the Family Justice Review Panel (published in November 2011). The report contains several recommendations that are of particular significance to expert witnesses practising in the family courts. As promised, now that the dust has settled, we are able to give a fuller appraisal of the contents of the report as they relate to expert witnesses, reaction from those likely to be affected and some indication of future plans for implementation of the proposals.

Announcing publication of the report, the Family Justice Review Panel said that its recommendations were aimed at tackling delays and generally improving the family justice system. The report affirms and emphasises the paramount welfare of the child principle. This is, of course, nothing new, and the principle is already firmly entrenched in all family law cases involving children.

The proposed changes to public law children cases include a recommendation that there should be a new 6-month time limit in care cases so that delays are reduced significantly. In addition, the Panel proposes that the family courts place less reliance on 'unnecessary' expert evidence and should refocus on determining whether the child should go into care.

David Norgrove, Chair of the Family Justice Review Panel, said:

> *'Our package of recommendations to the Government and the judiciary will make the current family justice system more effective. We need to eliminate the shocking delays in the system'.*

The 155-page report devotes a little over nine pages to matters relating directly to expert witnesses. The section commences with a somewhat ambiguous statement as to the usefulness of expert evidence in child cases in the family courts. Acknowledging that expert evidence is '*often necessary to a fair and complete process*', there has been a trend towards what the Review Panel believes is '*unjustified use of expert witness reports, with consequent delay for children*'.

It will be apparent, therefore, that the report, so far as experts are concerned, begins with a rebuttable presumption that there is an overuse of expert witnesses with a consequent increase in the length of hearings. There is no direct reference to cost, but a cost-influenced subtext can be readily detected. Indeed, this subtext pervades the whole report. It should, then, come as no great surprise that the topic for the Family Justice Council's annual debate in December 2011 was '*Experts in the family courts: are they worth it?*'

Following a review of court files by the Ministry of Justice (MoJ), it was found that 92% of all cases involved expert reports and that there is an average of 3.9 reports per case. Of course, it is not uncommon to request reports from a number of experts in differing fields, such as psychiatrists, other medical professionals and independent social workers.

The review calls for primary legislation to reinforce the point that in commissioning an expert witness report regard must be had for the impact of any associated delay on the welfare

Recommendations intended to reduce reliance on experts

Family Justice Review's recommendations relating to expert witnesses

- These recommendations intend to **reduce the reliance on expert witnesses** and **improve their supply and quality**.
- Primary legislation should reinforce that **in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child**. It should also assert that **expert testimony should be commissioned only where necessary to resolve the case**. The Family Procedure Rules would need to be amended to reflect the primary legislation.
- The **court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved**. Independent social workers should be employed only exceptionally.
- **Research should be commissioned to examine the value of residential assessments of parents**.
- **Judges should direct the process of agreeing and instructing expert witnesses** as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus.
- The Family Justice Service should take responsibility for work with the Department of Health and others as necessary to **improve the quality and supply of expert witness services**. This will involve piloting new ideas, sharing best practice and reviewing quality.
- The Legal Services Commission should routinely **collate data on experts per case, type of expert, time taken, cost and any other relevant factor**. This should be gathered by court and area.
- We recommend that **studies of the expert witness reports supplied by various professions be commissioned** by the Family Justice Service.
- **Agreed quality standards** for expert witnesses in the family courts should be developed by the Family Justice Service.
- **A further pilot of multi-disciplinary expert witness teams** should be taken forward, building on lessons from the original pilot.
- The Family Justice Service should **review the mechanisms available to remunerate expert witnesses**, and should in due course reconsider whether experts could be paid directly.

of the child. The legislation should also assert that expert testimony be commissioned only where necessary to resolve the case. Note that the Family Procedure Rules would need to be amended to reflect the new primary legislation.

Again, as with the paramount welfare principle, it appears that the Review Panel may simply be flogging a dead horse. Judges could surely be in no doubt as to best practice on this point, and already make very close scrutiny of all requests for additional reports. The Review continues by saying that the court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved, and that independent social workers should be employed only exceptionally. How easily does this sit with the pledge to uphold and protect the rights and interests of the child? Surely the child (and, indeed, the parents) should be entitled to best evidence and not merely such evidence as is available already. It is not hard to conceive of circumstances where the two are not synonymous.

The report further recommends that judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out the questions on which the expert testimony should focus in the order that gives permission for the commissioning of the expert witness. Of all the recommendations of the report, this is, perhaps, a provision that most would welcome.

Quality and supply of expert witnesses

Turning to the question of the supply and quality of expert witnesses, the Review Panel report recommends that the Family Justice Service (a dedicated and managed quango the report recommends be created) should take responsibility for working with the Department of Health and others to improve matters. As a sort of general catch-all provision, the report makes the wishful recommendation that the Family Justice Service should agree and develop for expert witnesses quality standards applicable to the family courts.

The report goes on to suggest that there should be another pilot of multi-disciplinary expert witness teams, building on the previous pilot that arose out of the Chief Medical Officer's 2006 report *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases, A report by the Chief Medical Officer*. It acknowledges, however, that some respondees (primarily experts themselves) have expressed doubt that multi-disciplinary teams of experts would have the flexibility and independence of individual experts. But it isn't just experts who have concerns about 'opinion by committee'.

The original, somewhat small, pilot ran between April 2009 and March 2011. A total of six teams was set up, but they attracted only 31 cases. Indeed, two of the teams attracted no cases at all! The evaluation report commissioned by the Legal Services Commission (LSC; Tucker, J. Moorhead, R. and Doughty, J. [2011] *Evaluation of the 'Alternative Commissioning of Experts Pilot' Final Report*) concluded that concerns (particularly amongst lawyers) about the implications of team-based expert witness services inhibited take-up. Furthermore, Tucker *et al*. stated that the take-up under the pilot scheme raises issues regarding the viability of multi-disciplinary teams.

'Expert opinion by committee' pilot study inconclusive

Of course, even if experts and lawyers were fully behind the idea of multi-disciplinary teams providing expert evidence, there is still the issue of resources. The evaluation report said:

> *'Resourcing such teams, and ensuring that they have the necessary capacity to provide expert witness services, requires more detailed planning and discussion with clinicians and their employers to establish whether (and in what form) teams are viable and able to contribute significantly to capacity within the [family justice] system.'*

If, as the report stated, '*This is likely to be a matter of financial incentives as well as persuading NHS providers that such work is consonant with the values of the NHS*', one wonders how the recent capping of fees by the LSC will play out. We have heard from a number of medical doctors that the capped fee levels are so low that many NHS institutions would in fact lose money on any clinicians who undertook LSC-funded court work!

In one of the few places in the Review Panel report where direct reference is made to questions of cost, the recommendation is made that the LSC should collate data on expert witnesses, to include type of expert, time taken, cost, etc. It appears that this recommendation arose out of the surprising lack of data that the LSC had been able to supply in relation to the use of expert witnesses. In a similar data-collecting exercise, it was recommended that studies of expert witness reports supplied to the family court should be commissioned by the Family Justice Service.

Lastly, the report notes the discontent about the way that experts are remunerated and the suggestion that this affects their willingness to take on work. Instead of experts having to chase individual solicitors, often for fractions of the total fee (there are regularly several parties in a family case), the report recommends that alternative means of payment should be investigated. It further suggests that, in due course, a system of direct payment from the LSC should be considered.

Impetus for LSC to pay experts direct

Responses to the report

The Government response to the Review Panel report was given on 6 February 2012. The Government states that it will be accepting the majority of the Review's recommendations in full. It says that, taken together, they will help strengthen parenting, reduce the time it takes

cases to progress through the courts and simplify the family justice system.

With reference to the findings of the Review, Maggie Atkinson, the Children's Commissioner for England, said that she welcomed the Government's commitment to ensuring that the family justice system places the best interests of the child at the heart of decisions in both public and private law court cases. She concurred with the Government, that this interest must be paramount in all proceedings.

Many fear that aim is to drive down cost

The response of the official opposition in Parliament was not so positive and resulted in an early-day motion in December. It said:

> *'... the Family Justice Review resulted in a Family Justice Panel that was not representative; ... that the response to the final report from groups campaigning for change has been almost uniformly negative; ... that the remoteness from reality that plagues family court decisions will remain; and calling on the Government to establish a new panel, including representation from groups that are not financially dependent upon the family justice system, to properly review the system'.*

Although the Government has indicated its acceptance of the Review Panel report's recommendations, this is often subject to qualification. The Association of Lawyers for Children has suggested that many of the Review's proposals are qualified so as to show that it is not really children and families that are at the heart of the government's proposals, but a drive to reduce costs. By way of example, the Review recommends another pilot of multi-disciplinary expert witness teams, yet it has postponed a roll-out of the Family Drug and Alcohol Courts, even though this latter model is said to show a successful multi-disciplinary expert team in action. The Association comments that:

> *'... the overwhelming impression of the government's response is that, contrary to both aims and expectations, it intends to do very little. Reforming the family justice system in the interests of children requires time and investment. This government intends to provide neither; indeed the plan is to reduce both.'*

Austerity Britain is not the right environment to redesign family justice

A cynical view of the proposals made in relation to limiting expert evidence might draw similar comment. The reality is that, far from making improvements to existing justice systems (all of which are likely to require substantial investment), the MoJ is faced with a £2 billion cut to its budget by 2015. In a drive to streamline procedures and reduce costs, it is inevitable that expert evidence will be a primary target.

It is illustrative of the current economic climate that proposed plans to develop a modern, integrated IT system for the family justice system have, again, been postponed.

Austere angst

The Guardian commented that the family justice review was overshadowed by '*austerity's dark cloud*'. Instead of policies that would avoid unnecessary court cases by investing in the alternatives, *The Guardian* sees the axe being taken to legal aid. This might very well reduce court case loads but, if so, says the newspaper, it will be by denying families access to justice, leaving disputes unresolved and trapping children in a cycle of their parents' conflict.

These fears were, in part, echoed by the Law Society of England and Wales. The Law Society's Chief Executive, Desmond Hudson, said that the Society supported the report's aims and recognised the need for '*radical and lasting change*' in the family justice system. But he warned that adequate resources would be needed to implement the changes. He added that:

> *'... to effectively halve the time which cases take now will require additional resources – more court time and more judges' time. It will also require more time from family solicitors.'*

He warned that the legal aid reforms will threaten this, adding:

> *'Legal aid cuts will lead to the family courts slowing down even further, as more and more people go to court unrepresented, which takes up court time as everything has to be explained and some people have completely unrealistic expectations of the process'.*

A member of the British Association of Social Workers said:

> *'... allowing budgetary issues to dictate what happens in cases involving vulnerable children is risky and unacceptable. We oppose tokenistic target setting in the current climate of austerity and cuts. It is just not realistic, and will only ever be feasible when social workers are given the right level of resources. Coupled with planned cuts to legal aid, this will demoralise already beleaguered front line social workers who are toiling around the clock to deal with increased case loads... . Sadly, this appears to be less about creating a child-centered system, and more to do with cost cutting and devaluing professional practice.'*

The general view appears to be that, although some aspects of the report are positive (e.g. the stress on the paramount welfare of the child and the United Nations Convention on the Rights of the Child), the majority of the proposals are unlikely to result in significant improvements. Some commentators go so far as to say that they are more likely to result in the system deteriorating still further.

Among users of the family justice system, there is an almost universal scepticism about the motives behind the review and the extent to which any improvements dependent upon significant investment will be implemented.

The Family Justice Review's conclusions and recommendations may well be an aspiration that has been accepted in principle by a government that has given no sign of either the intent or the ability to provide the resources to give effect to them.

Hot-tub trial

We have reported previously on the practice of 'hot-tubbing' (e.g. *Your Witness* 60), a procedure that allows experts to give their evidence concurrently and for judge-led 'discussion' of the expert issues. The great advantage claimed for the system is that it saves time. The expert issues that are agreed, and those that are not, are established quickly, and the examination and cross-examination of two or more experts can often be completed in the time it would otherwise take to deal with a single witness. It enables experts to give a direct and immediate view on the opposing evidence and to comment on points as they arise. The court can then consider all aspects of the expert evidence together and while matters are still fresh in the mind.

The old adage 'time is money' has never been truer than when applied to the English civil courts, and the relative expense of expert evidence in contested proceedings is a matter that has been uppermost in the minds of those charged with reforms to the justice system. In his final report (*Review of Civil Litigation Costs: Final Report 2010*), Lord Justice Jackson recommended that there should be a pilot scheme to assess the extent to which the 'hot-tubbing' technique could be used successfully in the English civil courts. This recommendation was taken up by the judges at the Manchester Technology & Construction Court and Mercantile Court, who agreed to participate in a pilot study. The scheme had judges identifying those cases that might be suitable as pilot studies and inviting the parties to participate.

In June 2010, the court issued a guide to voluntary participation in the scheme. This laid down certain criteria for establishing suitability, including:

- **complexity** of the issues
- **importance of expert issues** to the case
- **number of experts and areas of expertise**, and
- **extent to which use of the procedure is likely to help** clarify expert issues and save time and/or costs at the hearing.

The pilot scheme, which continues, is being monitored by the UCL Judicial Institute. It will attempt to evaluate the efficacy of the scheme using questionnaires to those judges, barristers, solicitors and expert witnesses who have taken part. Although the first such case to be heard was in December 2010, there have been only three completed cases to date. Whilst at first sight this appears somewhat disappointing, we understand that a number of cases that were selected for the pilot settled before trial, and there are several more cases in the pipeline still awaiting final hearings.

Albeit with only a small sample of completed questionnaires to hand, the UCL Judicial Institute published its first interim report on the scheme in January 2012. Although the Institute acknowledges in its report that there are insufficient data to reach solid conclusions, the information garnered thus far makes an interesting study and gives some useful pointers to how the procedure is likely to develop and the extent to which it has been favoured by participants.

Pilot study of hot-tubbing in progress in Manchester

Pilot cases

The first pilot case concerned the fitness for purpose of motor vehicles supplied under a contract and involved expert evidence from engineers. After the case had concluded (in favour of the claimant), the legal representatives of the parties were positive in their assessment of the procedure. The consensus was that it was efficient and made it easier for the court to compare the evidence. The point was also made that it may have encouraged greater objectivity on the part of the experts. The claimant's solicitor mentioned, specifically, that the process had '*reduced time and expense for the parties*' and had allowed the judge to '*take control of the evidence*', although this was apparently with some reluctance on the part of counsel for both parties! Other participants, however, were less positive about the extent to which costs had been saved, and the majority believed that the procedure had been cost neutral.

But the participants disagreed about the rigour of the process. Both the judge and the claimant's solicitor took the view that the procedure had given a more rigorous examination of the expert evidence than would have been the case in the conventional sequential evidence and cross-examination procedure. However, both barristers and the solicitor for the defendant took the opposing view.

The judge thought that the case had run smoothly and there had been a large amount of reading and analysis before trial. He had gained an immediate feel for the weight of each side's position because the expert evidence had been heard side-by-side. That style of presentation had made it possible to quickly narrow the issues in dispute.

And what of the experts themselves? Sad to relate, only one of the experts responded to the questionnaire – and he only in part. However, it was clear from his comments that he was broadly happy with the procedure. The expert was a man of some considerable experience, who had been giving evidence in the conventional manner for more than 40 years. He did not identify any particular advantage of concurrent evidence over conventional evidence, but he did say that he found the procedure to be less adversarial and he felt it was easier to explain differences of view. He highlighted the main benefit as being that:

> *'... when the other expert said something with which I did not agree, I could immediately explain my disagreement direct to the judge, rather than have to explain it to my counsel and for him then to cross-examine the other expert.'*

Initial monitoring report gives cause for optimism

The hot-tub focuses minds

Pointing to the fact that technical points were not always grasped fully by counsel, the expert thought that the ability to talk direct to the judge was a '*great improvement*'.

The second pilot case involved questions of causation in damage to cargo in transit. The judge said that it had been considerably easier for the court to compare the evidence and the process had been more focused. The only concern he expressed was whether the procedure would be appropriate if there was likely to be any serious attack on the competence or impartiality of any of the experts. Overall, he thought that the procedure would best suit cases where the expert issues were fairly narrow.

The parties' representatives, too, were fairly positive. With one exception, they all felt that the procedure had been more efficient, easier and more focused. The dissenting voice was that of the losing defendant's solicitor, who did not think that the procedure had made much difference one way or the other.

Again, the question of rigour divided views. One of the solicitors reported that the procedure had the effect of focusing minds on the expert evidence before the trial and he found the procedure to be less adversarial. Only one participant thought that there had been any significant saving in costs, although all felt that some trial time had been saved.

This second case brought a more substantive response from the experts. Both experts gave positive reactions, agreeing that the procedure had been more efficient, easier and more focused. One thought that there had been a more rigorous testing of the evidence and greater objectivity, although the other opined that this was no more than in conventional cases. As before, the one advantage highlighted by the experts was the ability to raise issues directly and to deal with disagreements quickly.

The third and most recent case followed the trend set by the first two. This case concerned a property dispute where the expert evidence involved the opinion of surveyors as to the precise location of a boundary. Of those who responded to the questionnaire, all agreed that the process was efficient and focused. Neither the judge nor the losing claimant's representatives thought that there had been any saving in costs. The judge thought that court time had been saved by as much as half, but pointed out that the costs to the parties had already been incurred. As in the first case, there was a lamented lack of response from the experts, neither of whom returned the questionnaire.

Insufficient evidence of hot-tub cost savings

Conclusions

Even though the interim report is based on a small sample of cases, patterns are already beginning to emerge. The great majority of the responses indicate that judges and most participants find that a system of concurrent evidence has a higher level of efficiency and focus. It encourages all involved to concentrate on issues prior to trial and to identify areas of disagreement. The ease with which conflicting evidence can be examined side by side was generally found to be helpful, as was the way in which the technique allowed the court to consider and dispose of the issues one by one, instead of having to return to them, often hours later, as happens with sequential evidence.

The rigour with which the court can conduct its examination of the expert evidence remains a moot point. Some thought that the pilot scheme enabled a more rigorous examination of the evidence, whilst others thought that it was neither more nor less rigorous. However, only a small minority of respondents thought that it was less rigorous.

The biggest disappointment to the architects of the scheme will be the perceived effect on costs. While many thought that the procedure had resulted in savings of court time (in one case as much as half), the great majority did not believe that it had produced any significant saving of costs. It should be noted here that in all the completed pilot cases the expert evidence was heard in a day or less. Consequently, if the saving in court time amounted to less than a day, the saving in expert fees was seen to be negligible because almost all experts charge by the day for attendance at court. It remains to be seen whether savings in court time in more lengthy trials will result in reductions in expert costs.

The interim report finds that there are 'time and quality' benefits to be gained from the use of concurrent expert evidence, and that there is no evidence of significant disadvantages from the point of view of the judiciary, counsel, solicitors or experts. The report's author does acknowledge that a larger database of concluded cases is needed to make a fuller evaluation, particularly with regard to rigour and costs. The report concludes that, in view of the positive evaluations received to date, and the willingness of parties to participate (as demonstrated by the number of cases that were signed up initially to the scheme but which settled before trial), it would:

> *'... seem entirely appropriate that in the implementation of the Jackson Report recommendations, the use of concurrent evidence should be included in the Part 35 Practice Direction as an optional procedure which can be adopted if the judge so directs.'*

It therefore seems increasingly likely that 'hot-tubbing' will receive the green light to go ahead as an optional procedure in cases deemed suitable by the judge. We assume, however, that the necessary amendments to the Practice Directions will not be contemplated until a more seemly number of pilot cases have been concluded and there has been a more thorough evaluation of the merits of the system, particularly having regard to the views of experts themselves.

Experts and privileged knowledge

In June 2011 (see *Your Witness* 65) we reported on the cases of *Bolkiah*[1] and *Meat Corporation of Namibia*[2] in which the court considered the position of expert witnesses who were claimed to be in possession of privileged or confidential information that should disqualify them from acting. Another case has come before the court that clarifies further the position of experts.

In *A Lloyd's Syndicate -v- X*[3], the claimant applied to the court for an injunction restraining an expert from acting in arbitration proceedings on the grounds that the claimant had instructed the expert previously in another, unrelated but similar, matter and that the expert was in possession of privileged and confidential information that he would be able to use to the disadvantage of the claimant at the arbitration. The nature of the confidential information was, in short, that the expert was aware of the views of the claimant on a particular clause in a contract of reinsurance.

It will be recalled that in the *Bolkiah* case the experts (a firm of accountants) had, in effect, acted like solicitors and were actually engaged to provide services and obtain information in that context. The information they gleaned was likely to be very damaging to the claimant and the accountants were in the same position as solicitors concerning that information. Accordingly, in disqualifying the accountants from acting in subsequent proceedings involving their erstwhile client, the House of Lords was protecting a quasi-solicitor/client relationship and the disclosure that went with it.

In the recent *Lloyd's Syndicate* case, the court distinguished *Bolkiah* on the ground that the facts were not analogous. Unlike the accountants in *Bolkiah*, there was no quasi-solicitor/client relationship. And unlike a solicitor, there was no burden on the expert to demonstrate that there was no risk of confidential information being misused. The onus was on the applicant to show that the expert would be unable to avoid having resort to that information.

Considering the authorities, the court ruled that an injunction should be granted only if the claimant could establish that the expert would be unable to avoid resorting to confidential or privileged information. The court made it clear that, to the extent that the expert had been given confidential or privileged information, it could not be divulged.

The court will treat each application for expert disqualification on its individual merits, having regard to the principles outlined above. The case makes it clear, however, that, notwithstanding the decision in *Bolkiah*, the position of experts is very different from that of solicitors. There will be no automatic presumption that the expert has received confidential or privileged information while acting previously for a party, nor a presumption that, even if the expert has received such information, he will resort to it.

Waiver of privilege

In *ACD -v- Overall*[4], the court considered whether privilege in an expert's draft report had been waived by referral to it in a witness statement.

The claimant made an application to strike out allegations of negligence and breach of contract contained in the defence and counterclaim. Resisting the strike out application, the defendants entered in evidence a witness statement that sought to give substance to the counterclaim. The witness statement referred to an expert's draft report. The defendants were clearly aware of the privileged nature of the draft report and tried to preserve privilege by stating specifically in the statement that the draft report had privileged status. But, the statement then went on to refer to no less than 18 points contained in the draft report. Unsurprisingly, the claimant asked for the expert's draft report to be disclosed on the grounds that privilege had been waived whatever the defendants asserted in the witness statement.

The court held that privilege had, indeed, been waived and that the claimant was entitled to disclosure of the draft report. The court gave a very useful guide in its judgment to the current state of the law and the precise circumstances in which privilege will be lost by referral to the document as one that is relied upon. This is summarised as follows:

- Documents referred to in a witness statement used in interlocutory or final court hearings must be disclosed, unless there is good reason not to do so.
- One good reason is that the documents are privileged.
- Privilege will be waived where an otherwise privileged document is actually or effectively referred to in a witness statement and part of its contents are actually or potentially deployed for use in the interlocutory proceedings or in the final trial.
- A party that deploys part of the privileged document in a witness statement will be required to disclose the whole of the document so that they cannot pick and choose what will be disclosed and what will not.
- The test of whether a document is being deployed is whether the contents are being relied upon.
- The fact that the document is referred to in the witness statement is sufficient to demonstrate its relevance.

The court concluded that there had been a deployment of the draft report in the witness statement and that, by referring to the 18 points in support of the defendant's defence and counterclaim, there had been a clear reliance on it to support the defendant's case.

If a reminder was still needed about the dangers of unintentional waiver of privilege, this case, and the succinct judgment given by the court, should serve that purpose!

No automatic bar on expert who brings prior knowledge to court

References

[1] *HRH Prince Jefri Bolkiah -v- KPMG* [1998] *EWCA Civ* 1563.

[2] *Meat Corporation of Namibia Ltd -v- Dawn Meats (UK) Ltd* [2011] *EWHC* 474 (*Ch*).

[3] *A Lloyd's Syndicate -v- X* [2011] *EWHC* 2487 (*Comm*).

[4] *ACD (Landscape Architects) Ltd -v- Overall and another* [2011] *EWHC* 3362 (*TCC*).

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