Your Witness

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Death by a thousand cuts

In the last issue we reported on the ticking off given by Lord Goldring to experts who were 'allegedly' increasing the number of hours billed to compensate for the Legal Services Commission (LSC) capping the amount expert witnesses can be paid from legal aid funds at 10% below arbitrarily low 'benchmark' levels (see *Goldring accuses experts of fee padding*). Now experts who continue to accept publicly funded cases will have to contemplate a further 20% cut in the rates the Legal Aid Agency (LAA, successor to the LSC) is willing to pay.

Between 9 April 2013 and 4 June 2013 the Ministry of Justice (MoJ) is running the latest in a series of 'consultations' on changes to legal aid – *Transforming Legal Aid: Delivering a More Credible and Efficient System*. Why the quote marks? It will not have escaped the attention of many readers of *Your Witness* that this sort of exercise from the MoJ is not about reaching out to the citizenry to ask for input on how best to reach an end goal. Oh no, this is just a rubber-stamping exercise about decisions already taken.

Following the introduction of the changes to the scope of legal aid through implementation of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* on 1 April 2013, the number of expert services funded by legal aid is expected to reduce sharply. This should be added to the decrease in funded cases expected as a result of the *Family Justice Review* reforms. The MoJ now wants to consider whether the current level of fees for expert witnesses paid out of the legal aid budget represents value for money.

The MoJ committed at the time it introduced the original fee cap to monitor the effect. You will be delighted to hear that the MoJ considers that '*overall [monitoring] has confirmed that the market has adjusted to the new codified hourly rates*'. One wonders who they asked!

The intention at the time of introducing the fee caps was that the MoJ would work with affected groups on the ongoing development of a more detailed scheme based on fixed and graduated fees and a limited number of hourly rates. This reflected the fact that the LSC 'benchmarking' did not include any analysis of the prices paid for similar services elsewhere. Apparently '*this has proved difficult to achieve as the LSC, and now the LAA, does not contract directly with experts and therefore does not currently collect robust data on their use*.' Doubtless the fact that the organisations that put so much hard work into engaging with the MoJ in the 2010 consultation were rewarded with complete disinterest had its part to play in this.

The MoJ tells us that this data gap is being addressed, with the introduction in February 2012 of new forms for applying for prior authority, and with planned improvements to the LAA's case management systems at the end of 2013. Well about time!

Pending the collection of robust data on which to base a new fee scheme for expert witnesses paid out of the legal aid fund, the MoJ has explored comparative expert witness fee rates paid by the prosecution in criminal cases (under the Crown Prosecution Service's Expert Witness Fee Scheme). It has concluded that there is '*no sufficient justification for paying generally higher fees under the legal aid schemes*'. Hence the decision to go for a further blanket 20% cut.

Having no data to judge the value that any particular expert witness report delivers, and so unable to know what actually represents good value for money, the MoJ continues in its simple-minded approach. The dangers in this are clear. As John Gordon, Chartered Building Surveyor (an expert in the *Register*), put it:

> *'I believe that the LSC is missing the point. Before the LSC cut its rates, I was doing a considerable amount of work for a firm of solicitors who operated in an area of deprivation and whose clients were almost always legally aided. The partner of that firm from whom I was taking instructions told me that in almost every case where I reported, in Part 35 format, the case was won and my costs were recovered. Thus there was no cost to the LSC. Now that the LSC have reduced their cost rates, and judges are calculating costs based on those low rates, it comes as no great surprise to me that some lawyers and experts may have agreed to increase the hours claimed in order to secure the benefit of better quality reports, although I have not been a party to any such thing. I think that Lord Justice Goldring is missing the point completely in his grumbles about 'cost padding'. He, of all people, ought to know that if you pay peanuts you get monkeys.*
>
> *'The LSC and the legal establishment should recognise that better reports from competent and experienced experts are more likely to reveal the truth. This will result in lost causes being abandoned and strong cases being won. If a case is won the LSC will recover its costs. Paying proper fees will actually save money.'*

It seems as if the MoJ has no interest in the quality of the expert evidence it pays for, and is happy with the potential outcome that its spend on expert opinion evidence should reduce because so few people need to work at the fee rates on offer. So much for *Access to Justice*.

Chris Pamplin

Role of the expert in Scotland

Expert witnesses in Scottish courts share much with those in English courts

The adversarial system used in Scottish courts is not dissimilar to that employed in the courts of England and Wales. The rules that have developed specifically with regard to witness-led evidence (in Scotland called 'testimony') deal with issues common to both systems and, in many respects, have adopted similar precepts.

Admitting expert evidence

The general rule admitting evidence of expert opinion is common to most developed legal systems. In England and Wales, qualified people may express opinions on matters on which the *ordinary person* is:

- **unlikely to appreciate the facts** due to their technical nature, or
- **unlikely to form a correct judgment** without the assistance of people with special knowledge.

This general exception also applies in Scottish law[1].

Similarly, the factors used by English courts to test the qualification of an expert are broadly the same in Scotland, namely that the expert (in Scotland called a *Skilled Witness*) must be able **to demonstrate relevant specialist knowledge gained through study or experience in relation to the matter on which the opinion is to be offered**[2].

However, the rules of civil and criminal procedure are not codified to the same extent in Scotland as in England and Wales.

In Scotland, the question of whether expert evidence should be given is generally one that each party must decide. Similarly, if the decision to call such evidence is made, it is for that party to decide what documentation to lodge. There is **little interference by the court** in this process.

The general rules of evidence require that **any document a party is intending to rely upon must be lodged 28 days prior to the proof** (i.e. the trial). In some procedures, however, any medical reports being relied upon must be lodged at an initial stage.

Reports need not be in writing!

It should be pointed out that there is **no rule of court in Scotland that requires an expert report to be provided in any particular written form**, or indeed in writing at all. There are occasions, particularly when evidence is sought late in the day, where an expert witness is asked to provide evidence without a written report. So oral expert evidence can be given without any earlier written report being available for reference by the court. This can lead to obvious difficulties for the court, the parties and the expert, and is a situation best avoided.

Control of expert evidence

Difficulties in achieving the effective control and evaluation of expert evidence are the same in Scotland as in England and Wales. However, although there have been some calls to do so, Scottish courts have so far resisted the temptation to follow the examples of *Daubert* in America which give judges a 'gatekeeping' role.

Scottish courts will **exclude evidence as irrelevant if its basis is insufficiently sound**, but Scottish law leaves it to the trier of fact to evaluate and assess expert evidence by deciding what, if any, weight it should receive. Scottish courts, therefore, will admit scientific evidence provided it is **rooted in a recognised body of knowledge**, but otherwise will not screen for reliability of the science or technique on which the evidence is based. The **primary focus is on the expert's expertise**, rather than on the reliability of the underlying scientific technique, and the judge's assessment of the weight that should be attached.

In Scotland, some suggestions have been made regarding the use of **court-appointed neutral experts** in place of the court having to choose between conflicting expert evidence. However, there is less concern in Scotland compared with other jurisdictions, and the powers of the Court of Session to appoint an assessor, and of the sheriff, on application, to remit to a person of skill, to report on any matter of fact are rarely employed.

There are, however, some controls on the use of skilled witnesses.

- In the Court of Session, if an assessor is sitting, limitations are placed upon the parties' recourse to evidence of skilled witnesses. Generally, only one skilled witness may be led on each side on a matter within the qualification of the assessor, unless leave is obtained.
- If the case arises out of a collision at sea and a nautical assessor is sitting, no skilled evidence is required on nautical matters.

These situations apart, there is **no procedural limitation upon the number of skilled witnesses** to be led by a party.

Disclosure differences

Stricter procedures governing disclosure of expert evidence are being introduced slowly.

In actions in the Sheriff Court concerning damages for personal injury or death, all medical reports upon which the pursuer intends to rely must be lodged with the initial writ, or the defender may move for an order for their production.

In a commercial action in the Court of Session, the parties must lodge copies of expert reports at least 3 days in advance of the procedural hearing, and amongst the commercial judge's wide range of powers is one to appoint a skilled person to examine the issues, including the reports of any skilled witnesses.

There are also procedures to **encourage the agreement of expert evidence** in both civil and criminal cases. For example, there is a general requirement to seek to agree evidence in commercial procedures in the Court of Session, and, in criminal proceedings, parties may by

notice call upon the other to admit or accept evidence in the form of a report or in testimony from only one of two forensic analysts. In the event of a failure to serve a counter-notice, the evidence may be deemed to be admitted, evidence to contradict it may be inadmissible and, in the case of a skilled witness in civil cases, the court may refuse to certify the witness or award the expenses of calling that witness.

Defining the role of the expert witness

The expert's role and overriding duty to the court is, of course, well defined in English law, and this need for independence and impartiality is contained in Part 35 of the Civil Procedure Rules (CPR) and Part 33 of the Criminal Procedure Rules. In Scotland, however, the expert's duty is not codified to the same extent. Instead, there is a body of case law that has been relied upon (sometimes fairly obliquely) to establish the principles of independence and impartiality.

In *McTear*[2] (which lays down a similar set of doctrines and standards as the English *Ikarian Reefer* case), Lord Nimmo Smith stated in his judgment that **experts should not usurp the role of the advocate** and that the expert's duty was to provide **independent assistance to the court**.

This requirement has also been upheld in applications for costs. For example, in *M W Plant (Contracts) Limited -v- The Commissioner for Her Majesty's Revenue & Customs*[3], the Chairman dismissed an application seeking to have an appellant witness certified as an expert for expense purposes. Although the application failed primarily because there had not been a motion to enrol the name of the expert witness in a minute of proceedings prior to the taxation hearing, as required by Rule 42.13 of the Rules of the Court of Session, the Chairman said that even if he had not disposed of the application based on timing, he would not have certified the expert because he had not demonstrated independence and had acted as the 'representative' of one of the parties.

The duties and responsibilities of Scottish experts are similar to those who act in England and Wales. However, they are not set out in specific court rules so may be less obvious. Guidance is, however, provided by a Code of Practice issued by the Law Society of Scotland and published in conjunction with the Directory of Scottish Experts maintained by Scottish law publisher W Green (see page 4).

Scottish courts have been as prone as English courts to concerns over expert evidence. These have included the impartiality and objectivity of experts and the problem of the 'hired gun', the difficulties presented by distinguishing frontier science and pseudo-science, the need for judges and juries to better understand expert evidence and disputes between experts and, not least, the increasing costs in time and expense.

Furthermore, miscarriages of justice deemed to have resulted from defects in expert evidence or its interpretation have made headlines in Scotland in much the same way as in England. And while England had to endure the fallout from the unhappy case of Sally Clark, Scotland has had its own media frenzy over *McKie -v- Scottish Ministers*[4] (involving a miscarriage of justice resulting from expert evidence given by Scottish Criminal Record Office fingerprint officers).

Parties in Scotland have much greater freedom using expert witnesses

Expert witness expenses

The Court does retain a residual power over witness expenses. Consequently, there is a **power to award expenses** against the party instructing the witness or, in theory, against the witnesses themselves. Although it would be very rare to do so, the possibility remains that expenses may be awarded against experts who have strayed substantially outside their area of expertise, are deemed to have given evidence in bad faith or are otherwise seriously deficient.

One of the objectives of the CPR in England and Wales was to lessen the costs of expert evidence in civil cases. An important feature was the encouragement and requirement to investigate the possibility of instructing a **single joint expert** (SJE). However, the SJE is a rare creature in other legal jurisdictions within the UK. In Northern Ireland, there are no provisions at all for SJEs. In Scotland, the tendency is for each side to instruct its own expert. It is possible to appoint an SJE, but they are uncommon. If the suggestion is made that a single expert should be appointed, written confirmation from both sides will be needed.

In Scotland, in addition to providing the report itself, an expert will often be asked to attend a **meeting** with either the solicitor who is to conduct the case or the advocate and solicitor at a consultation. The purpose of a consultation is:

- to review the expert opinion, the documentation in the case and the opinion evidence relied upon by the opponent, and
- to consider any further preparation, investigation or reconsideration of the opinion that may be thought appropriate.

The rules of court in Scotland require a party to lodge in advance any report relied upon, but the opponents may decide not to do so and, instead, **lead only oral testimony** of their expert. Consequently, experts in Scotland can be cross-examined without having detailed advance notice. Another potential element of surprise for experts in Scottish courts is that **evidence contained in an academic journal** may be put to an expert even though it has not been lodged[5].

SJE instructions are much less common

Criminal cases

The position in relation to criminal cases in Scotland is that the prosecution of crime is undertaken under the authority of the Lord Advocate. Trials can take place either at the

ADR is less common in Scotland

High Court of Justiciary or the local Sheriff Court. The Procurator Fiscal is responsible for all prosecutions in the Sheriff Courts. In both the Sheriff Court and the High Court of Justiciary, trials can be heard with a jury. In the Sheriff Court, trials may also be heard by a Sheriff sitting alone.

Experts should seek guidance from either the prosecuting authority or the solicitor for the accused on precisely what arrangements are required to be made, the form of report needed and within what timescale.

There is a procedure in the Criminal Procedure (Scotland) Act 1995 whereby parties may seek to agree evidence by serving notices on each other, which can include the acceptance of expert evidence in the form of reports. It is the norm, however, for **oral testimony** to be given.

In some instances, there is specific provision made for expert evidence, e.g. in cases involving sexual offences. Section 275(c) of the 1995 Act as amended provides that it is now possible to admit expert psychological or psychiatric evidence for the purpose of explaining the behaviour of the victim or to rebut any inference that might be adverse to the credibility or reliability of the complainer which might otherwise be drawn from that behaviour.

ADR and the expert witness

In England and Wales there is already a well-defined role for experts in alternative dispute resolution (ADR). Scotland, however, lags somewhat behind, with less than 1% of civil cases taking the ADR route.

With the launch in 2011 of the Scottish government's initiative '*Making Justice Work*', it is likely that there will be changes. The initiative, which followed publication of the Gill Review of the Scottish Civil Courts in 2010, gives as one of its strategic aims that of developing:

> *'... mechanisms which will support and empower citizens to avoid or resolve informally disputes and ensure they have access to appropriate and proportionate advice, and to a full range of methods of dispute resolution, including courts and tribunals where necessary, and appropriate alternatives.'*

Scottish courts have greater flexibility in their use of experts

Conclusion

While the role of the expert in Scottish courts might at first sight bear striking similarities to that of experts in England and Wales, there is undeniably much greater flexibility in both the use of experts and the form and content of expert evidence. To date, the Scottish courts have identified little need for such stringent controls on experts as have been considered necessary in other jurisdictions. Recent calls for reforms in the Scottish system are, however, likely to result in changes. The direction that will be taken in relation to expert evidence remains to be seen.

Next time we will consider terms of engagement for expert witnesses in Scotland.

Code of Practice: Expert Witnesses Engaged by Solicitors in Scottish Courts (issued by the Law Society of Scotland)

Introduction

This Code is intended to assist experts to ensure that they can effectively meet the needs of solicitors, so those solicitors can in consequence better serve their clients and the interests of justice. They are intended to be of general application and there may be additional requirements relating to cases in specialised areas of law.

Acceptance of instructions

1. Experts should ensure that they receive clear instructions from solicitors (in writing unless this is not practical) specifying the solicitor's requirements, which should cover:
   (a) Basic information such as names, addresses, telephone numbers, dates of birth, and dates of incidents;
   (b) The type of expertise which is called for;
   (c) The purpose for requesting the report, and a description of the matter to be investigated;
   (d) Questions to be addressed;
   (e) The history of the matter, identifying any factual matters that may be in dispute;
   (f) Details of any relevant documents;
   (g) Whether proceedings have been commenced or are contemplated, the identity of the parties, and whether the expert may be required to attend to give evidence;
   (h) Whether prior authority to incur the estimated fees needs to be obtained by the solicitor before the instructions can be confirmed;
   (i) In the case of medical reports: where the medical records are situated (including, where possible, the hospital record number); whether or not the consent of the client/patient to an examination and disclosure of records has been given; and whether or not the records are to be obtained and provided by the solicitor;
   (j) In cases concerning children, a note that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.
2. Instructions should be accepted only in matters where the expert:
   (a) Has the knowledge, experience, expertise, qualifications, or professional training appropriate for the assignment;
   (b) Has the resources to complete the matter within the timescales and to the standard required for the assignment.
3. A time limit for the production of the report should be agreed. When the agreed time limit cannot be met, notice of the delay should be communicated at the earliest opportunity.
4. Experts should make clear to solicitors what can and cannot be expected on completion of the assignment. In particular, as soon as possible after being instructed, they should identify any aspects of a commission with which they are unfamiliar, or not professionally qualified to deal, or on which they require or would like further information or guidance.
5. If any part of the assignment is to be undertaken by parties other than the individual instructed, then:
   (a) Prior agreement must be obtained from the instructing solicitors;
   (b) The names of the individuals to be engaged and details of their experience and qualifications must be given.

6. Where a firm has been instructed, the names of the individuals to be assigned to the project and details of their experience and qualifications must be given on request.

Terms of Business

7. Experts should provide Terms of Business for agreement prior to the acceptance of any instructions. These should include:
   (i) Daily or hourly rates of the experts to be engaged on the assignment or alternatively an agreed reasonable fee for the project or services;
   (ii) Treatment of travelling time;
   (iii) Travelling or other expenses or outlays;
   (iv) Rates for attendance at court (note that this may be subject to a fixed limit);
   (v) Provision for payment of a specified fee in the event of late notice of cancellation of a court hearing;
   (vi) Provision for preferred timing of payment.

Professional conduct

8. Experts must comply with the Code of Conduct of any professional body of which he/she is a member.

Confidentiality

9. The identity of the client or any information about the client acquired in the course of the commission shall not be disclosed by the expert except where consent has been obtained from the client or where there is a legal duty to disclose.
10. A solicitor is usually under a duty to pass on to the client all information material to the client's case; exceptional circumstances where this may not apply, and where it will be necessary for the solicitor to decide whether to disclose such information to the client, include cases where it could be harmful to the client because it will affect the client's mental or physical condition (for example, a medical report disclosing a terminal illness).

Independence

11. Experts will bear in mind that:
    (a) When giving evidence at court, the role of a witness of fact, or an expert witness, is to assist the court and remain independent of the parties;
    (b) A solicitor must not make or offer to make payment to a witness contingent upon the nature of the evidence given.
12. Experts will disclose to solicitors at the start of each project any personal or financial or other significant circumstances which might influence work for the client in any way not stated or implied in the instructions, in particular:
    (a) Any directorship or controlling interest in any business in competition with the client;
    (b) Any financial or other interest in goods or services (including software) under dispute;
    (c) Any personal relationship and/or professional relationship, and the nature thereof, with any individual involved in the matter;
    (d) The existence but not the name of any other client of the expert with competing interests;
    (e) Whether the expert has worked with the expert instructed by the opposing party (if known).
13. Any actual or potential conflict of interest must be reported to the solicitor as soon as it is raised or becomes apparent and the assignment must be terminated.

Investigation

14. Experts should consider whether there is a need to see the client, visit a site, etc., and if so, agree the practical arrangements with the solicitor in advance.
15. In the case of medical reports:
    (a) If the doctor has treated the patient before, ensure that the patient's consent has been obtained to the release of the information contained in the notes and that such consent is informed consent;
    (b) If the doctor has not treated the patient before, ensure that the patient's consent is obtained to the examination and to the disclosure of their records to the doctor; and, where practicable, consent of the other doctors involved in the care of the patient should be obtained before releasing information held by them.

Preparation of the report

16. The report should cover:
    (a) Basic information such as names and dates;
    (b) Purpose in presenting the report, and description of matter investigated;
    (c) The history of the matter;
    (d) Methodology used in investigation;
    (e) Details of any documents used;
    (f) Facts ascertained;
    (g) Inferences drawn from the facts, with reasoning;
    (h) Summary of the expert's qualifications and experience.
17. Plain English should be used and any technical terms explained.
18. Copies of any document or papers referred to in the report should be provided; any items referred to may be subject to recovery by commission in any court proceedings and experts should ascertain from instructing solicitors whether or not in view of that it is appropriate to refer to documents provided by the solicitor; it is unnecessary to copy widely and easily available documents.
19. The expert's final report should be dated and signed by the individual(s) who will if required give evidence in support of it.

Complaints procedure (if requested)

20. Experts should provide a procedure for resolving complaints by solicitors, including the following:
    (a) If there is a complaint, the expert must give the solicitor client the name of the person to contact in the event that they are dissatisfied with the service provided;
    (b) In the event of a complaint being made, the expert should:
    (i) Tell the solicitor what the procedure will be for resolving the complaint;
    (ii) Respond appropriately offering any appropriate redress in a timely manner;
    (iii) If the solicitor remains dissatisfied, give them the names and addresses of any professional or trade bodies of which the firm or the individuals assigned to the commission are members;
    (iv) Identify the cause of any problem and correct any unsatisfactory procedure.
    (c) In the event of allegations relating to an Expert's failure to adhere to the above Code of Practice or any breach of their contract with the instructing solicitors, The Law Society of Scotland and W Green reserve the right to exclude such an Expert from any future edition of the Directory of Expert Witnesses.

References to the Directory

21. An expert listed in the Directory may describe themselves as so listed. The expert may not refer to this listing as a qualification or describe themselves as approved, accredited, or recommended by The Law Society of Scotland and W Green.

Law Society of Scotland issues Code of Practice

References

[1] *Assessor for Lothian Region -v- Wilson* [1979] *SC* 341.

[2] *McTear -v- Imperial Tobacco* [2005] 2 *SC* 1.

[3] *M W Plant (Contracts) Limited -v- The Commissioner for Her Majesty's Revenue & Customs* [22 November, 2007] *Edinburgh Tribunal Centre* E01074.

[4] *McKie -v- Scottish Ministers* [2006] *SC* 528.

[5] *Roberts -v- BRB* [1998] *SCLR* 577.

Access to expert reports by parties

Material used in open court is public

Expert reports in contentious proceedings are, by their very nature, likely to contain confidential and sensitive information. They may also include material that is claimed as the intellectual property of the expert. And there may be other factors that would make it undesirable for the contents of the report to be made available to a commercial competitor, to the Press or to the world at large. However, documents that have been considered at a public hearing and formed part of the judicial decision-making process are, in theory, in the public domain. So they are available to the public pursuant to the policy of open justice required by Article 6 of the European Convention on Human Rights. What, then, is the position with regards the obtaining of expert reports by non-parties?

The simple answer is that non-parties are, in principle, able to obtain copies of documents (including expert reports and witness statements) referred to in open court. This is, however, subject to certain provisos and, in the case of expert reports (and some other documents), the permission of the court must be sought.

Documents obtainable without permission

Under CPR 5.4, non-parties are entitled to obtain copies of certain documents on the court file without the court's permission.

CPR 5.4C came into force on 2 October 2006. It states that non-parties are entitled to access all statements of case filed at court after 2 October 2006 (including the particulars of claim, the defence, any reply and any further information provided by the parties) without obtaining the court's permission and without notice being given to any of the parties. However, the rules allow parties to apply to the court in advance for a pre-emptive order restricting the release of court documents to non-parties [CPR 5.4C(4)]. But this is restricted to documents that constitute or form part of the statement of case. The rules now state that any person who is not a party to proceedings is entitled to obtain the following classes of document without the court's permission:

CPR Part 5 deals with open access to court papers

- claim form
- particulars of claim
- defence
- reply
- reply to defence
- counterclaim or other additional claim, and
- any further information provided in response to a CPR Part 18 request.

Documents obtainable with permission

When there is a public hearing, open justice comes into play and if documents formed part of the decision-making process, including expert reports, access should also be given to them as well as to the judgment.[1]

CPR 5.4C(2) governs access by non-parties to documents other than statements of case, judgments and orders. It states that

> *'... 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'.*

These classes of document obtainable with the permission of the court include:

- documents attached to a statement of case (e.g. an extract from a contract)
- witness statements
- expert reports
- skeleton arguments
- notice to admit and response
- correspondence between the parties and the court, and
- certain documents in relation to a mediation.

The requirement for permission is a 'safety valve' intended to allow access only to documents that should be provided in legitimate circumstances.[2]

Open justice leans towards open access

'Open justice' is an old principle of common law. In *Scott -v- Scott*[3], Viscount Haldane referred to:

> *'... the broad principle which requires the administration of justice to take place in open Court'*

and said that any exception:

> *'... must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.'*

In the case of *Dian AO -v- Davis Frankel and Mead*[4], Moore-Bick J said that if a non-party seeks permission to use documents from the court file simply as a source of potentially useful information, the principle of open justice is not engaged. The court should give access to these documents only:

> *'... if there are strong grounds for thinking that it is necessary in the interests of justice to do so'.*

However, in *ABC Ltd*[1], Lewison J thought that was putting the bar a little too high. He found that 'useful information' could legitimately be gleaned for the purposes, for example, of collateral litigation. He cited the case of *R (Taranissi) -v- Human Fertilisation and Embryology Authority*[5], in which disclosure was allowed when the BBC sought permission to inspect documents in unrelated proceedings that were likely to contain information relevant to a libel action between the claimant and the BBC.

Lewison J considered that an order for disclosure could also be made legitimately in circumstances not involving collateral litigation, e.g. for the purposes of investigative journalism[6]. However, while recognising that subsequent changes to the rules had made it possible for a wider class of document to be disclosed to non-parties, Lewison J clarified that Moore-Bick's judgment in *Dian* remained good law and that disclosure should be ordered if it is in the interests of justice.

Even if that were not so, but the documents had been read by the court as part of the decision-making process, the court should lean towards disclosure if a legitimate interest can still be shown.

The change in the rules, he said, did not herald any change in the court's approach to documents for which the court's permission was always required or to statements of case to which the court has restricted access by express order under CPR 5.4C(4).

Lesson learnt from hacked 'phones

In *Various Claimants -v- News Group Newspapers Ltd*[7], there was an application to the court by *The Guardian* newspaper for certain documents filed in relation to the second defendant, Glenn Mulcaire, a private investigator engaged by the *News of the World*. The case, involving the alleged 'phone hacking by Mulcaire of various well-known figures, was one that dealt with sensitive and private information. The judge, Vos J, had made various orders restricting access to the court file. Guardian News & Media Limited (GNM) subsequently issued an application for an order under CPR 5.4C(2), or 5.4C(6) or the inherent jurisdiction of the court for permission to obtain copies of three documents referred to in open court at the Pre-Trial Review (PTR) hearing. The documents were supplied by News Group to GNM but in redacted form. The court had to decide, amongst other things, whether the documents formed part of the 'statement of case' or whether they should be classed otherwise for the purposes of CPR 5.4C(2) and 5.4C(6), the extent to which the interests of justice required disclosure, and the extent to which, if any, the documents could be redacted.

The main objection to unredacted disclosure was that this might prejudice a future fair criminal trial of Mr Mulcaire. There was also the need for personal details of the 'phone hacking victims to be protected. GNM's reason for requesting the unredacted documents and the purpose for which it intended to use them were also relevant.

Vos J found it hard to accept GNM's contention that it needed the documents so that it could properly understand the issues debated at the PTR. It was clear from *The Guardian*'s news coverage that GNM had little difficulty in following what was argued and decided at the PTR. The judge considered that the real reason for the application was that GNM wanted to publish any material it could about the litigation, and would use whatever extracts from the three documents that it thought would make a good story.

Considering *Dian*, *ABC Ltd* and other prior authorities, Vos J did not think that GNM's motivation was necessarily an improper one or that this was, in itself, a ground for dismissing the application. He acknowledged that there had, justifiably, been widespread public interest and attention, and that the litigation had wider consequences beyond the narrow ramifications of the damages claims themselves. He did not think it unfair to say that it had been the catalyst for many important events, not least the Leveson Inquiry.

Vos J took the view that there was

> *'... a distinct and crucial public interest in scrutinising the decision-making process in this case, and in knowing the facts on which the decisions are being made'.*

There remained a real and vital public interest in the dissemination of accurate information about the course the proceedings were taking, the settlements that had been entered into, the allegations made by the claimants against the defendants, and the admissions made by the defendants. For these reasons, it seemed to Vos J to be entirely legitimate for GNM and other media organisations to wish to see unredacted copies of the core documents on the basis of which the proceedings had been and were being conducted.

Having regard to the potential prejudice to Mr Mulcaire, Vos J concluded that disclosure was the lesser of two evils, because there was such a strong public interest in accurate information about the proceedings being available. Any jeopardy to Mr Mulcaire in his possible future trial was uncertain in so many ways that it could not weigh heavily in the balance. Consequently, with one exception (with regard to one allegation made against Mulcaire), the court granted the application for copies of the documents in unredacted form.

Vos J, in delivering his judgment, said that he placed great store by open justice. He had sought to ensure that the public and the media could have access to court hearings and to any material that is not so confidential that it must be protected. The kind of material he thought should be protected included the identity of third-party victims of telephone interceptions, and the telephone numbers, passwords and pin numbers of victims. He also mentioned that the police had been keen to keep the names of individual journalists and named executives of News Group Newspapers (NGN) protected from further publicity, even if they were already in the public domain.

Conclusions

While the application in NGN was not one that involved expert reports, the principles applied by Vos J would, in theory, apply equally to those that did. Consequently, any non-party that can demonstrate a legitimate interest in seeing an expert report can apply to the court for permission. It would appear that media frenzy and a public hunger for information can, in some cases constitute a sufficient ground for an application to be granted.

Court permission required to access an expert report

References

[1] *ABC Ltd -v- Y* [2010] *EWHC* 3176 (Ch) 9.

[2] *Dobson -v- Hastings* [1992] *Ch* 394.

[3] *Scott -v- Scott* [1913] *AC* 417.

[4] *Dian AO -v- Davis Frankel and Mead* [2005] 1 *WLR* 2951.

[5] *R (Taranissi) -v- Human Fertilisation and Embryology Authority* [2009] *EWHC* 130.

[6] *Chan U Seek -v- Alvis Vehicles Ltd* [2004] *EWHC* 3092 (Ch).

[7] *Various Claimants -v- News Group Newspapers Ltd and another* [2012] *EWHC* 397 *(Ch).*

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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