Your Witness

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Power to appoint SJEs

In issue 102 we looked at grounds for abandoning a single joint expert (SJE). The item generated some correspondence, which is always good to receive. One note, from Simon Potter, an expert in architectural matters, pointed us to the case of *Edwards -v- Bruce & Hyslop.* I am grateful to Simon for that, and you can read why on page 2.

The other correspondence received leads me to conclude that it is worth while recapping the powers of the court to appoint an SJE, as well as the pros and cons of their use.

The Civil Procedure Rules (CPR) Part 35.7(1) provide that, where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by an SJE. Indeed, selection of the SJE can be made by the court in default of the parties' agreement (CPR 35.7(2)).

CPR Practice Direction 35.7 provides that the court will take into account all of the circumstances when considering whether to give permission for the parties to rely on expert evidence and whether that evidence should be from an SJE. In particular, the court must consider whether:

- it is **proportionate** to have separate experts for each party on an issue with reference to the amount in dispute, the importance to the parties and the complexity of the issue
- the instruction of an SJE is likely to assist the parties and the court to **resolve the issue faster** and in a **more cost-effective** way than separately instructed experts
- expert evidence is to be given on the issue of **liability, causation or quantum**
- the expert evidence falls within a **substantially established area of knowledge** that is unlikely to be in dispute, or there is **unlikely to be a range of expert opinion**
- a party has **already instructed an expert** on the issue in question, and whether that was done in **compliance** with any Practice Direction or relevant pre-action protocol
- **questions put in accordance with CPR 35.6 are likely to remove the need** for the other party to instruct an expert if one party has already instructed an expert
- **questions put to an SJE may not conclusively deal with all issues** that may require testing before trial
- a **conference may be required** with the legal representatives, experts and other witnesses which may make instruction of an SJE impractical, and
- a claim to **privilege** makes the instruction of an SJE inappropriate.

Pros and cons of using SJEs

Where the court decides that it is appropriate to appoint an SJE, it is likely to have a significant impact on the case. Where only one expert view is expressed, the evidential value will be considerable and will often determine the entire outcome. This can have the advantage to the courts and the parties of a swift settlement of the case. However, the appointment of an SJE will leave very little scope for argument on the substance and evidential value. Indeed, the court is obliged to have regard for the SJE's evidence, and to depart from it ***only when there is 'a proper evidential basis for doing so'***.

Mindful of this, the courts have placed an extra burden on the judge to examine the expert evidence rigorously and to be as sure as can be that the expert has reached the right conclusions and has not erred. This judicial burden is not one that is discharged easily, particularly when the evidence is technical and specialised, without the benefit of other expert testimony.

While the appointment of an SJE has these advantages, there are also some obvious disadvantages. For example, a party may have no control over the identity of the expert to be appointed. The party might, in any event, feel the need to instruct its own expert to advise on the SJE's report, the costs of which are unlikely to be recoverable. There may also be limited scope for examination of the SJE because courts are less likely to order the SJE's attendance at trial.

Of course, there are some valid objections to the appointment of an SJE, and these should be raised at the directions stage. These might include:

- the **complexity** of the issues
- the **importance of expert evidence to the likely outcome** of the case
- the **value of the claim** being sufficiently high that the appointment of separate experts would not be disproportionate, and
- the fact that the parties had **appointed their own experts before proceedings began**.

These objections might also be raised in any appeal against the appointment of an SJE.

It must be said that the courts are fairly flexible in their approach and will rarely impose an SJE on the parties when there are valid and compelling reasons not to do so. However, where an appointment has been made and the SJE has prepared a report, it will be much harder for a party to persuade the court to 'change horses' and allow a party to appoint its own expert. But, as we see overleaf, situations can arise that do justify the abandonment of an SJE.

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Inside

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Independence of SJEs

Use of SJEs is preferred, but not mandated, by the CPR

In *Grounds for abandoning an SJE* (see *Your Witness* issue 102), we examined various instances in which the courts have allowed a party to appoint its own expert witness. This might include cases where the party disagreed with the findings of a single joint expert (SJE), wished to seek the opinion of another expert witness, or had otherwise lost confidence in the SJE. In particular, we examined the court ruling in the recent case of *Hinson -v- Hare Realizations Ltd*[1]. In this case, Spencer J considered the correct approach to be taken by the courts in addressing such circumstances.

There are, of course, other occasions when an SJE might be removed or replaced. One such instance would be where the SJE's conduct had demonstrated or created such serious concern that the evidence could not be relied upon as properly independent.

A cosy side chat is not allowed

In *Edwards -v- Bruce & Hyslop (Brucast) Ltd*[2], the court considered one such case, the facts of which were briefly as follows. The defendant was the owner of a listed building in Liverpool. In 2004, he had engaged the claimant to manufacture, supply and install three replacement wrought-iron balconies. There was subsequently a dispute about the quality of the claimant's work, which the parties had agreed to refer to an expert architect. The expert considered that the casting work was of an *acceptable* quality. A dispute remained as to the sums due from the defendant to the claimant, so the claimant commenced proceedings. The defendant counterclaimed damages for defective work. The case was transferred to the county court, and the judge ordered that the expert architect who had been instructed would be the SJE in the case.

There were, for whatever reason, delays by the parties in submitting their written questions to the SJE. This resulted in a gap of about a year between the expert's initial report and his second report. In the second report, the expert now expressed the opinion that the materials and workmanship of the claimant were of an *unacceptable* standard, which was a departure from his original findings.

When a party loses confidence in an SJE, another expert can be instructed

The claimant then learnt that the defendant's solicitors had been in contact with the expert without their knowledge and consent. Accordingly, the claimant sought a report from another expert and applied to the court for permission to rely on the newly commissioned report.

Second expert instructed

The judge hearing the application granted permission to rely on the second expert's report, having concluded that there had been secret communications between the defendant's solicitors and the first expert, thus rendering the latter's position no longer tenable.

The claimant appealed against this decision on four grounds, namely that:

- the judge had given **insufficient weight to the fact that the usual course adopted by courts in cases of modest value was to appoint an SJE**
- the judge had **not found that the expert's integrity had been impaired by 'inappropriate' access** by the defendant's solicitor
- the judge should have **first ordered that the claimant and the defendant should meet the original SJE**, and any question of the second expert being appointed should have waited until after that without-prejudice meeting, and
- there was a **serious procedural irregularity** because the judge had not had an opportunity to read the defendant's statement.

Hearing the appeal, Coulson J said, in relation to the first point, that while it was the court's strong preference for there to be an SJE (*Daniels -v- Walker*[3]), it was not correct to say that the judge had given insufficient weight to or had ignored the effect that his order would have on proceedings. He believed that the judge had been painfully aware of those issues, having expressed his reluctance to make the order sought. However, he had concluded, for the reasons set out in his judgment, that, given the circumstances, it was the right thing to do. Further, it could not be said that the order by itself would have increased the costs out of all proportion to the sums in dispute.

Turning to the communication that had taken place between the defendant's solicitor and the expert, Coulson J said that, where there was an SJE, it was **not permissible for one party to have a conference with the SJE in the absence of the other party without the latter's prior written consent** (*Peet -v- Mid Kent Area Healthcare NHS Trust*[4]).

Of course, it was impossible to say with certainty what effect the dealings between the defendant's solicitor and the SJE might have had on the expert's views, but **the very existence of the secret communications between them had been sufficient to taint the independence of the expert**'s second report. The judge observed that one potential effect was evident by comparing the expert's first and second reports!

In those circumstances, Coulson J was satisfied that the claimant was entitled to adduce his own expert evidence. He said that **an SJE owed an overriding duty to the court to give advice on the issues independent of the interests of the parties, and was in a position of considerable importance**. The expert's conclusions could be determinative of the case as a whole. In this case, communications between the defendant's solicitor and the expert were not merely 'inappropriate', but had been contrary to the

rules. The action had been unjustifiable and had tainted the expert's independence.

In response to the third and fourth grounds for appeal, the court found nothing in the Civil Procedure Rules (CPR) Part 35 to provide that an expert appointed in a particular case had to meet a third party, who had no status in the litigation, before there could be any application for that party to become an expert in the case. So far as the judge's reading of the defendant's statement was concerned, there had been no serious procedural irregularity because the judge had read this statement by the time he gave his judgment and, in any event, it was largely irrelevant.

The appeal was dismissed.

Courts couldn't be much clearer!

The decision in *Edwards* is just the latest in a series of similar judgments on the central need for **SJEs to maintain strict independence from the parties**. For example, note should be taken of the decision in Mann J in *Meat Corporation of Namibia -v- Dawn Meats UK Ltd*[5]. The ruling in that case states that the decision as to whether an expert should be permitted to give evidence in a case of challenged independence is a matter of fact and degree. The judge will have to weigh the alternative choices openly if the expert's evidence is excluded, having regard to the overriding objectives of the CPR. If the challenge to the independence is not sufficient to preclude the expert from giving evidence, it may nevertheless affect the *weight* of the expert's evidence. The court recognised that, in some situations, it might not be possible to determine with sufficient clarity whether the circumstances justify ruling inadmissible the expert evidence at an interlocutory stage, in particular where the facts may be in dispute and may require further investigation in evidence. In such a case, admissibility might have to be decided at trial.

Last year, in *Blackpool Borough Council -v- Volkerfitzpatrick Limited & Others*[6], the court made further comment on the issue of independence of and communications with SJEs.

His Honour Judge Stephen Davies, sitting as a judge of the High Court in February 2020, reminded the parties in that case of the Civil Justice Council's *Guidance for the instruction of experts in civil claims* (this, and much more besides, can be found in our on-line library at *jspubs.com/library*). In so far as communicating with SJEs is concerned, paragraph 39 of the *Guidance* provides that **instructions given separately by one party should be copied to the other instructing parties**. Paragraph 43 confirms that **SJEs also owe an overriding duty to the court and an equal duty to all parties so that they can maintain independence, impartiality and transparency at all times**. Paragraph 44 contains guidance consistent with the decision in *Peet*. Finally, paragraph 46 requires SJEs to **serve their report simultaneously on all instructing parties**.

Judge Davies also gave a reminder that, **if a party seeks to rely upon expert evidence where the expert has not complied with the recognised duties of an expert witness to be independent and impartial, the court may exclude the evidence as inadmissible rather than merely taking such noncompliance into account** when deciding what weight should be attached to the expert evidence. That proposition is derived from the decision of the UK Supreme Court in *Kennedy -v- Cordia Services*[7] (see *Your Witness* issue 83).

He also pointed to the very clear guidance given by the Court of Appeal in *Peet* with regard to the propriety of unilateral contact between one party and an SJE. He quoted the words of Simon Brown LJ, who had said:

> *'When, if at all, should one party, without the consent of the other party, be permitted to have sole access to a single joint expert, i.e. an expert instructed and retained by both parties?… I believe that the answer to this question must be an unequivocal 'Never'… There can be no point in a unilateral meeting or conference unless what transpires between the party enjoying sole access and the expert is, at least in part, intended to be hidden from the expert's other client. What is to be hidden will necessarily be either the information which the party enjoying access is giving the expert, i.e. part of expert's instructions, or the expert's view expressed in the light of that information, or more likely both.'*

It appeared to Brown LJ that the hiding of such material seemed necessarily inconsistent with the very concept of a jointly instructed expert. Such an expert owes an equal duty of openness and confidence to both parties, besides an overriding duty to the court. That, in short, was the fundamental objection to any one-sided or clandestine communication.

Judge Davies also quoted with approval the words of Coulson J in *Edwards -v- Bruce & Hyslop*, when he said that **an SJE could no more have communications with just one party about the substance of his report, in the absence of the other side, than a judge can have a conversation on the telephone with one party, and not the other, about the strengths and weaknesses of that party's case**.

Conclusion

These cases serve to illustrate the dangers attendant on communications between SJEs and the parties. They provide a stark warning of the view likely to be taken by the court of any communication in secret with an SJE without the knowledge or consent of the other party or parties. Whether or not such communication results in a change in the expert's views, the court is likely to regard the expert's evidence as having been tainted, and to allow the expert to be abandoned and substituted.

SJEs must never have a private discussion with just one party

References

[1] *Hinson -v- Hare Realizations Ltd (2)* [2020] *EWHC* 2386 (*QB*).

[2] *Edwards -v- Bruce & Hyslop (Brucast) Ltd [2009] EWHC* 2970 *(QB).*

[3] *Daniels -v- Walker* [2000] *EWCA Civ* 508.

[4] *Peet -v- Mid Kent Area Healthcare NHS Trust* [2001] *EWCA Civ* 1703.

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

[6] *Blackpool Borough Council -v- Volkerfitzpatrick Limited, Range Roofing & Cladding Limited, RPS Planning & Development Limited, Caunton Engineering Limited* [2020] *EWHC* 387 (*TCC*).

[7] *Kennedy -v- Cordia Services* [2016] 1 *WLR* 597.

Discredited experts and unsafe convic

Not all expert failings will render earlier convictions unsafe

When, as sometimes happens, an expert witness is discredited at trial, or is found to be in breach of professional conduct requirements, it is likely to have a severe effect on the expert's credibility as a witness in future trials. In some cases, criticism or flagrant breaches of the rules will effectively end an expert's forensic, and sometimes professional, career. Such incidences are, at the very least, likely to be used to challenge their credibility as a witness in subsequent proceedings. **But what effect will the newly exposed lack of credibility have on the outcome of previous trials in which the expert has appeared?**

When an expert loses credibility

It is rare for the courts to reopen a case purely on the grounds that an expert who gave evidence has subsequently been criticised. But where the expert evidence was central to conviction, and so the expert's later troubles cast doubt on the safety of a conviction itself, it can happen.

In *R -v- Burridge (Michael Dennis)*[1], Leveson LJ reduced a murder conviction to manslaughter on the basis of doubtful expert evidence given at the original trial and in the light of new evidence that had emerged. He said, however, that 'expert shopping' was to be discouraged. Although public funds should always be available to instruct suitable experts when defending a criminal prosecution, it was less clear whether such funds should continue to be expended in seeking further expert evidence (in the hope of finding someone to say something different) after conviction. On the other hand, if fresh credible expert evidence had in fact been obtained that did provide a real argument as to the safety of a conviction, it was almost inconceivable that the court should not fully consider that new evidence and its implications.

Leveson LJ was keen to see the implementation of common standards applied in determining whether fresh expert evidence is such as to affect the jury's decision. Of course, these comments were made in relation to fresh expert evidence generally. They were not necessarily aimed at situations where the original expert had subsequently become the subject of criticism.

In *R -v- Pabon*[2] (see *Your Witness* 92), Gross LJ considered the safety of a conviction in a specific instance where the basis for the suggestion had arisen from the criticism of an expert. The defendant in *Pabon* was a derivatives trader at a bank. The Serious Fraud Office (SFO) brought proceedings against him and five others, each of whom were either convicted or pleaded guilty. It was alleged that the defendant had defrauded counterparties to LIBOR-referenced trades by agreeing to procure or make false or misleading LIBOR submissions. In his original grounds of appeal, he admitted seeking to move the LIBOR rate to suit his book and to favour the bank, but claimed that he had not acted dishonestly. The central issue for the jury had therefore been dishonesty.

At the retrial of two of his co-defendants, in cross-examination on new material concerning one of the SFO's expert witnesses it was revealed that the expert had gone beyond his general knowledge of banking. He had strayed into very specific areas that were at the edge of, or beyond, his knowledge, particularly in relation to short-term interest rate trades. The two co-defendants were acquitted.

Pabon therefore argued that his conviction had been rendered unsafe because the fresh evidence concerning the expert's failings would have permitted devastating cross-examination at his own trial, as it had done at the retrial of his co-defendants.

Although acknowledging that one of the experts in *Pabon* had signally failed to comply with his basic duties to the court, the judge held that the conviction for conspiracy to defraud was safe. The key issue at trial was that of the defendant's honesty, and there had been no causal link between this and the expert's failings.

Earlier this year, the Court of Appeal was called upon to further consider the safety of conviction in a case where the expert involved in the proceedings had subsequently had a challenge to his credibility as a witness.

In *R -v- Byrne (James Francis)*[3], two appellants appealed against their convictions for conspiracy to defraud. Both had been allegedly involved in a scheme for the dishonest selling of carbon credits to investors who were led to believe that the scheme would lead to substantial profits. The prosecution had instructed an expert to provide evidence in relation to the different types of carbon credit, their viability as investments and the legitimacy of the brokers used by the appellants. Both appellants had been convicted between 2016 and 2019.

Not all criticism of experts is relevant

At a later, unconnected trial in 2019, the expert concerned became the subject of considerable criticism. It was revealed that he had, in fact, received no training as an expert witness and had no relevant qualifications. Indeed, he appeared to have no academic qualifications at all (he sat three A levels but could not recall if he had passed any of them!). Furthermore, the judge at that trial had referred in his judgment to what he saw as the expert's clear preparedness to disregard his basic duties as an expert. He had failed to sign his statement or the declaration of truth as required by Criminal Procedure Rule 19.4. The judge also criticised him for his failure to demonstrate any understanding of these duties. It was further apparent that the expert had not conducted an independent review or analysis of the carbon credits market. In addition, the expert had misrepresented questions as having been asked by the police when he had, in fact, posed those questions to himself, and he had failed to retain case materials after the trial. The expert was also found to have brought

References

[1] *R -v- Burridge (Michael Dennis)* [2010] *EWCA Crim* 2847.

[2] *R -v- Pabon (Alex Julian)* [2018] *EWCA Crim* 420.

[3] *R -v- Byrne (James Francis)* [2021] *EWCA Crim* 107.

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inappropriate pressure to bear on a defence expert, to whom he had made a number of false or misleading assertions. And he had failed to bring to the court's attention material that might have undermined aspects of his own evidence. In conclusion, the expert was found to be an entirely unsuitable witness and should not be relied upon in any subsequent proceedings.

Following these comments, a spokesperson at the Crown Prosecution Service (CPS) made a statement confirming that the CPS would look at past cases in which the expert had appeared and 'consider any action necessary once these have been fully reviewed'. The CPS said that it would not, in any event, be using the expert in any future cases.

All fairly damning, and one must assume that the appellants in *Byrne* felt some confidence that the criticism was so negative that the court would take the view that their conviction was consequently unsafe.

Hearing the appeal, Lord Justice Fulford held that the expert's lack of formal qualifications should have been made clear at the outset. However, that was not determinative of whether he was entitled to give expert opinion evidence. Indeed, the expert appeared to have considerable expertise in the financial, commodity and carbon credit markets, and it had not been suggested that a witness should hold any particular formal qualifications before being entitled to give expert evidence in that field. Fulford LJ further noted that neither appellant had sought to adduce any expert evidence at trial, and had not mounted any credible challenge to the evidence given by the prosecution expert. Following the decision in *Pabon*, the court took the view that it would be untenable to conclude that the convictions were unsafe simply because evidence that remained undisputed was given by an expert witness who was, in later proceedings, found to have behaved unprofessionally.

Conclusion

As identified in *Pabon*, the word 'unsafe' connoted a risk of error that exceeded a certain margin so as to justify the description *unsafe*. It involved a risk assessment. The court was required only to answer the direct and simply stated question of whether it thought the conviction was unsafe.

The court was still required, therefore, to consider the decision of Levison LJ in *Burridge*, namely whether the new information regarding the expert's deficiencies would reasonably have affected the decisions to convict if it had been available at the appellants' trials and the jury had been given proper directions in relation to it.

In this case, and following the previous decisions, the mere fact that an expert witness had been discredited for unprofessional conduct did not render unsafe earlier convictions imposed at trials where the expert had given evidence and where that evidence remained unchallenged. Thus, the appeals were dismissed.

Scots law expert

If a case in the English courts involves a contract made under Scottish law, does it give a party the right to call an expert witness on Scottish law?

The question arose in the recent case of *SDI Retail Services Limited -v- The Rangers Football Club Limited*[1]. The details of this complex case need not detain us, but at a case management conference in January 2021, Mr Lionel Persey QC (sitting as a High Court judge) heard and determined the issue of the admissibility of such expert evidence.

The parties in the case had identified three expert disciplines. Two disciplines were unremarkable, but they disagreed on the third, expert evidence on Scottish law.

The parties were in broad agreement that the governing law of the contracts was Scottish law. Rangers argued that it was appropriate for the Club to call expert evidence on any application and effect that Scottish law would have on the issues in dispute. SDI disagreed, pointing out that, whilst Scottish law might be applicable, no issues of Scottish law had emerged from the pleadings.

Rangers sought to rebut this and to identify some issues of Scottish law in its submissions. The judge, however, was not persuaded that they had done so. He held that, unless and until clear issues of Scottish law were on the face of the pleadings, the court would proceed on the basis that English law was the same as Scottish law.

The judge did stop short of imposing an absolute prohibition. He was minded to give Rangers some time to identify and plead the principles of Scottish law upon which they intended to rely. SDI could then respond. Should any issues emerge from this, the parties were given liberty to raise them at a further hearing. Rangers was allowed 21 days in which to identify and plead further particulars of its case on Scottish law, after which SDI would have 28 days to reply.

While this order might appear harsh, it is as well to bear in mind the constant drive in the courts to keep costs proportionate. The parties' costs projections, based on three experts, came to £600,000 for expert fees alone.

It will be apparent from this that even though an English court is hearing a contractual dispute that involves a contract or contracts governed by Scottish law, the court is unlikely to allow expert evidence unless there is a particular point of Scottish law identified and pleaded. The court in England and Wales will treat the admissibility of expert evidence on Scottish law in the same way as it will treat any other form of expert evidence. The permission of the court must be sought, and will only be granted if the evidence is relevant and it is reasonable and proportionate to do so. If expert evidence is to be adduced on any aspect of Scottish law (or, indeed, on the law of any other foreign jurisdiction), then it is important for a party to identify this at the outset and to make sure that specific mention is made in its pleading.

Expert evidence on Scots law must, like all other evidence, be a proportionate cost

References

[1] *SDI Retail Services Limited -v- The Rangers Football Club Limited* [2021] *EWHC* 103 (*Comm*).

Judge rejects expert evidence

Judges must give reasons for rejecting expert evidence

It is reasonable to expect that where expert evidence is given by a well-qualified expert in an established field, the court would need very good reasons to disregard it. But to what extent is this required and how far should the judge go in giving reasonable grounds for disregarding what is, *prima facie*, good and persuasive expert evidence?

In *Brunt -v- Wrangle*[1], Michael Green J heard the appeal of two appellants in probate proceedings. These were the mother and brother of a deceased person who had originally been granted letters of administration on the basis that the deceased had died intestate. Some 10 years after the grant, an uncle of the deceased, supported by the deceased's sister, had come forward with a document purporting to be a will made by the deceased in 1999. It was alleged that this will had been discovered by an advisor to the family. The will had been contested as a forgery by the appellants, who claimed it was created after death. The advisor, who had since died, had a previous conviction for fraud.

A copy of the purported will was also found. Both the will and the copy bore the signature of the advisor as attorney to the deceased, but the signatures were slightly different. Documents were also produced purporting to be two attendance notes and an entry in the advisor's diary stating that the will had been signed.

The appellants had obtained expert evidence. Two handwriting experts agreed that the two wills had been executed separately. They had concluded that the advisor had not signed these in 1999, as claimed, but at a later date when his handwriting had deteriorated. In addition, one page of the copy will had been printed on different paper and by a different printer. The experts also concluded that the note in the diary was not contemporaneous.

The case was listed originally for an 8-day trial in March 2020. However, the Covid-19 lockdown forced the matter into a 3-day hearing with oral evidence restricted to the main witnesses only. Therefore, there was no opportunity for the cross-examination of some witnesses, including the experts.

The Master found in favour of the deceased's uncle and sister, who he described as impressive witnesses. He didn't think they would engage in fraud. Conversely, he found the deceased's mother an unimpressive witness. The Master said he had 'taken account' of the advisor's previous bad character but held that the will was valid on the basis of the documentary evidence and the facts, and nothing in the expert evidence persuaded him otherwise.

When assessing the evidence and making a finding of fact in such cases, the procedure to be adopted by the judge is set out in *Parsonage*[2]. Fact finding commences with the taking of evidence of reliable, contemporaneous documents. To this is added the known, established or probable facts. These must then be considered and built upon by looking at witness evidence consistent with that underlying body of reliable documentary evidence.

Hearing the appeal, Green J acknowledged that the Master had not had an easy task in reaching his decision. The test in *Parsonage* should be followed where it was possible to do so. In this case, however, there were no 'reliable contemporaneous documents', as all of the documents in evidence were disputed and all were alleged to have been forged. The only undisputed facts were ones that should have given rise to a high degree of suspicion. Consequently, by taking the disputed documentary evidence as the basis for his finding of fact, the Master had erred.

The test in *Parsonage* could not be used as a prescription for fact finding in this case. Consequently, if the Master had relied on his perception of the demeanour of the witnesses and had chosen to believe one side's witnesses over the other, it was incumbent on him to explain his reasons in his judgment. He had not done so. There was no explanation of why he had concluded that the mother was an unimpressive witness, and it was an error not to explore any possible motive she might have had for lying. Finally, the Master had given no explanation of what he meant by taking into account the advisor's 'bad character'.

The expert evidence in this case was strong. It provided powerful evidence that the will had not been signed in 1999. If this, together with the other expert evidence that suggested forgery, was to be rejected, then the appeal court would expect to see clear reasons set out in the judgment. This was particularly true in the circumstances of a reduced trial, and the Master should have made reference to all of the witnesses' statements, stating the importance he had placed on them and whether and why he had accepted or rejected them. This, said Green J, was a serious flaw in the evidential assessment, and more weight should have been given to the expert evidence.

Although appeal courts will be reluctant to interfere with a judge's findings of fact, the courts must be able to see how the finding of fact has been reached. Accordingly, the appeal was allowed.

In this case, the Master appears to have formed a view based solely on the demeanour of the witnesses who gave oral testimony. Because the expert evidence did not fit with this view, he had rejected it. While he might have had good and just cause for doing so, it is essential that those reasons be identified. Proper and appropriate weight should be given to expert evidence. Where, on the face of it, there is no material evidence to challenge that which has been given, it is incumbent on the judge to identify any reasons that he or she might have for rejecting that expert evidence.

References

[1] *Brunt -v- Wrangle* [2021] 1 *WLUK* 332.

[2] *Parsonage (Deceased), Re* [2019] *EWHC* 2362 (*Ch*).

An expert's fiduciary duty: update

We reported recently on the decision in *A Company -v- X*[1] that appeared to create a novel duty on expert witnesses. The circumstances in that case were sufficient, in the judge's view, to give rise to a fiduciary duty of loyalty owed by the expert witnesses to those who instructed them (see *Your Witness* issue 101 for the detail).

We were surprised at this decision because it seemed to be one with potentially alarming consequences for experts. Indeed, it did not sit comfortably with an expert's existing duties and responsibilities, not least of which is the **expert's overriding duty to the court**.

Unsurprisingly, the decision was appealed[2], and the judgment of the Court of Appeal was given on 11 January 2021. Coulson LJ referred to the issues and the decision in the case as novel and potentially significant.

Coulson LJ summarised the decision given by O'Farrell J in the lower court. She had found that Secretariat Consulting Pte Ltd (SCL), an entity within the Secretariat group, all of which provide litigation support services and act as delay and quantum experts in construction arbitrations, owed its client (the respondent) a fiduciary duty of loyalty. She held that this, in turn, meant that Secretariat International UK Ltd (SIUL) could not provide similar expert services to a third party, who was making a claim in another arbitration against the same respondent arising out of the same project and concerned with similar subject matter. This, said Coulson LJ, was the first time in the English jurisdiction that an expert had been found to owe a fiduciary duty to the client.

The Court of Appeal approached the matter with what, on the face of the judgment, appears to be a level of trepidation. The issue of whether there was a fiduciary duty in this case was to be resolved on the particular facts of this case, and by reference to the terms of the relevant retainer.

In this specific case, there was a contract that contained an express clause dealing with conflicts of interest. The Court of Appeal identified that this clause in SCL's retainer had two distinct consequences. By agreeing to the provision, SCL had confirmed that:

(1) there was no conflict of interest at the time of the agreements, and

(2) it undertook that it would not create any such conflict of interest in the future.

On this basis, the Court was satisfied that SCL owed the respondent a clear contractual duty to avoid conflicts of interest for the duration of the retainer.

Turning to whether any duties imposed by the contract extended to other companies within the SCL group, the Court was mindful that there was a specific and highly restrictive confidentiality agreement that had been entered into by the respondent's solicitors and SCL. It identified the important clause as being: '*Under no circumstances shall [SCL] at any time, without the prior written approval of [the respondent's solicitors] acknowledge to any third party what is or is not a part of the Confidential Information, nor shall [SCL] acknowledge to any third party the execution of this Agreement, the terms and conditions contained herein or the underlying discussions with [the respondent's solicitors].*'

Additionally, the conflict of interest clause contained in the agreement was based on a conflict check carried out in respect of all the various entities within SCL. Effectively, SCL had given an undertaking on behalf of all the SCL entities because they had all been the subject of the conflict check.

In this case, said the Court, there was a clear conflict of interest between SCL acting for the respondent and SIUL acting for the third party. The overlaps were all-pervasive. Indeed there was an overlap of parties, role, project and subject matter. In effect, a given expert could act both for and against the client.

Coulson LJ acknowledged that large multinational companies often engaged experts on one project and saw them on the other side in relation to another dispute. That, he considered, was inevitable. However, a conflict of interest was a matter of degree. The overlaps in the instant case made it plain that there was a clear conflict of interest, and that there had been a breach of the obligations in the agreement. Such a finding reflected the terms of the original retainer and was consistent with what was said in *Bolkiah -v- KPMG*[3] in respect of those providing litigation support services. Accordingly, the appeal was dismissed.

Court of Appeal side-steps the key question

It will be quite apparent that the Court of Appeal reached this decision purely on the facts of the case, and on careful consideration of the contractual duties and obligations contained in the retainer, conflict of interest clause and confidentiality agreement. The decision rather side-steps, though, the broader questions posed in relation to experts and fiduciary duty generally.

Indeed, Coulson LJ said expressly in his judgment that the existence, or otherwise, of a fiduciary duty of loyalty would not, in this case, add to the obligations arising from the contractual clauses. He took the view that considering the issue further was unnecessary for the disposition of the appeal.

It appears, therefore, that, depending on the terms of an expert's retainer, the relationship between a provider of expert services and their client might have one of the characteristics of a fiduciary relationship. The court did not feel that this was inconsistent with an expert's obligations to the court.

However, because it was not necessary to find the existence of a freestanding duty of loyalty in the instant case, the broader question remains the subject of continuing uncertainty.

Complex contractual clauses create cover for Court!

References

[1] *A Company -v- X* [2020] *EWHC* 809 (*TCC*).

[2] *Secretariat Consulting Pte Ltd -v- A Company* [2021] *EWCA Civ* 6.

[3] *Bolkiah -v- KPMG* [1999] 2 *AC* 222.

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