# Your Witness

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## In short

In response to our coverage in issue 82 of *Your Witness* of Mr Justice Turner's view that too many expert reports are too long, we received a number of letters. Typical of these is the following from Janet Stowe, an Occupational Therapist, who wrote:

> *'I shall keep this letter as short as possible, but felt I must comment on... Mr Justice Turner's observations regarding the length of the reports, especially care reports.*
>
> *'As a care expert I agree with him as he says there "is a regrettable tendency for experts to produce reports which are simply far too long" and also where Sir James Munby details that "expert reports can in many cases be much shorter..." Sir James Munby goes on to suggest that the history and narrative should be reduced.*
>
> *'This, I think, depends on the discipline of the person writing the report. As a care expert, the history given in my reports is often rather long, and I do question myself as to whether this is necessary or not, especially as the history has been described in many of the other reports read.*
>
> *'In my opinion, and my own experience, I carefully analyse the history from all the documents I have read, together with the information given at interview, and this forms the basis for my care costs. If I, as a care expert, were to reduce the often lengthy history in my report, having often read copious lever arch files full of information, I would not be able to quickly justify my care costs. I would have to go through all the documentation to find which information has assisted me in making my decision. This is not a practicable solution to reducing the length of reports.*
>
> *'I do not know if any other experts have the same opinion.'*

If you work in an area that also has to deal with forming opinions based on distilling voluminous background material, how do you balance the need to properly justify your opinion with keeping your report as short as possible?

## Withdrawing from civil instructions

We have had a spate of Helpline enquiries recently from experts who are considering withdrawing from civil instructions. This can happen when the relationship between the expert and the instructing lawyer has broken down, perhaps due to non-payment of fees. Sometimes, though, problems stem from the inability of the instructing lawyer to keep the expert 'in the loop' with developments in the case, including important court orders that require some timely action from the expert.

Looking at withdrawal first, an expert who wishes to withdraw entirely from a case should read para 27 of *Guidance for the instruction of experts in civil claims* which is brought into the Civil Procedure Rules by para 1 of the Part 35 Practice Direction. Para 27 reads:

**Experts' Withdrawal**

27. Where experts' instructions are incompatible with their duties, through incompleteness, a conflict between their duty to the court and their instructions, or for any other reason, the experts may consider withdrawing from the case. However, experts should not do so without first discussing the position with those who instruct them and considering whether it would be more appropriate to make a written request for directions from the court. If experts do withdraw, they must give formal written notice to those instructing them.

Clearly it is a matter for each expert to decide the sort of behaviour from a solicitor that might constitute 'good cause'. However, experts must remain mindful of their overriding duty owed to the court once instructions are accepted, and this consideration will, perhaps, become more pressing the closer one is to a court hearing.

If a failure to keep you informed on progress in a case is a factor, and of court orders in particular, when setting out the reasons for withdrawal, you might wish to refer to what you feel are the failures of the solicitor to abide by para 8 of the Part 35 Practice Direction. It reads:

**Orders**

8 Where an order requires an act to be done by an expert, or otherwise affects an expert, the party instructing that expert must serve a copy of the order on the expert. The claimant must serve the order on a single joint expert.

## Use of experts in the family court

Changes to the Family Procedure Rules and the introduction of new standards for experts presented an opportunity to the Ministry of Justice to improve the evidence base on the use of experts in family law. It commissioned research to explore how experts are appointed in light of the new Rules and to develop an understanding of the contribution they make to just and timely decisions in the family court. The final report was published in December 2015.

In my view a key finding that really needs to result in some action is that on the quality of letters of instruction. The report finds there needs to be '*continued efforts to ensure that [letters of instruction] are clear, focused, and include only the minimum number of case-specific questions required to appropriately instruct the expert*'. Hear, hear!

*Chris Pamplin*

## Inside



**Issue 83**

*March 2016* 

# Admitting expert evidence

*To what extent can an expert opine on a legal duty?*

In the previous issue of *Your Witness* we reported on the High Court decision in *British Airways plc -v- Spencer*[1], in which the court gave guidance on the nature of expert evidence that would be admissible. Three main points arose from the judgment in that case as follows.

- Particularly in important cases of high value, **a party should have the ability to put its best case forward and to adduce the evidence it reasonably considers would advance its case**. This guidance was subject to the proviso that it should not result in oppression or unfairness to the other parties or occupy a disproportionate amount of court time.
- **It is undesirable to tie the hands of the trial judge if that can be avoided**. There is discretion in this situation (under Civil Procedure Rule 35.1) to disallow evidence where a party is simply trying to bolster its case by the inappropriate use of expert evidence. However, where there is doubt as to the value the court might gain from that evidence, it is best resolved in favour of the party wishing to adduce it.
- **If the trial judge decides at an early stage of the proceedings that the evidence will not assist the court, the judge can at that stage decline to receive the evidence** in accordance with his wide-ranging trial management powers.

### A step too far?

In February 2016 the Supreme Court delivered its judgment in *Kennedy -v- Cordia LLP*[2], an appeal from the Scottish Court of Session. The judgment casts further light on the question of admissibility, particularly when the expert evidence sought to be adduced is of arguably questionable probative value.

Mrs Kennedy was employed by Cordia as a domestic carer. In the course of this employment she was required to make home visits to clients, to whom she provided personal care. In the winter of 2010 she was asked to visit an elderly lady for this purpose. She was driven to the client's home by a colleague, but to access the property she had to walk a short way along a public footpath. The weather had been bad and there was still a considerable amount of snow and ice on the sloping path. Mrs Kennedy was wearing what were described as flat boots with ridged soles but, in the course of negotiating the path, she slipped and fell after only a few steps and injured her wrist.

*Court says expert evidence on legal duty of employer inadmissible*

She started proceedings against her employer on the ground that it had been negligent in failing to supply her with appropriate footwear. In doing so, she relied on expert evidence from an expert on health and safety and risk management.

At first instance she succeeded in her claim, but this was subsequently overturned by an Extra Division of the Inner House, from whence Mrs Kennedy appealed to the Supreme Court. The issues in the case turned almost entirely on the evidence given by Mrs Kennedy's expert and Cordia's health and safety manager.

### Expert evidence

Mrs Kennedy's expert was a consulting engineer with a degree in engineering and a diploma in safety and hygiene. He was a chartered member of the Institute of Safety and Health and an associate member of the UK Slip Resistance Group. He had been involved in numerous risk assessments and had carried out research into anti-slip footwear. He cited the advice of the Health and Safety Executive relating to the wearing of such footwear.

In addition to expert opinion on the risk and the extent to which this could be avoided by anti-slip attachments, the expert also gave evidence of a factual nature, such as the conditions prevailing on the day in question and the degree to which the path was sloping. The Court also heard evidence that a number of other employers whose staff had to work outside in such weather conditions had provided staff with anti-slip attachments, and Cordia had been aware of this.

Although Cordia had carried out a risk assessment, it had not, it seems, considered it appropriate to supply its employees with slip-resistant footwear. While it had advised its employees to wear appropriate footwear, it had not specified what might be appropriate.

The statutory case was based, firstly, on the Management of Health and Safety at Work Regulations 1999 which implement Directive 89/391/EEC: under regulation 3(1), employers are required to carry out a suitable and sufficient risk assessment. Secondly, the Personal Protective Equipment at Work Regulations 1992 implement Directive 89/656/EEC. They require, under regulation 4(1), that suitable personal protective equipment be provided to employees who may be exposed to a risk to their health or safety while at work, except to the extent that such risk has been adequately controlled by other means either equally or more effective.

Although objecting to the admissibility of Mrs Kennedy's expert evidence, the employer called its own health and safety manager to give evidence as to the risk assessments she had performed and to the advice given to employees regarding the wearing of suitable protective footwear.

Overturning the earlier decision, Lord Brodie of the Extra Division of the Inner House had been somewhat scathing in his criticism of the decision to allow Mrs Kennedy's expert to give evidence. Lord Brodie was of the opinion that, in doing so, the Court had abdicated its role as decision maker. He considered that the proper course was for the Court to decide whether:

- the risk assessment had been sufficiently adequate, and

- the advice given to Mrs Kennedy had complied with the Regulations and Directives in the light of the risk assessment findings.

On the whole, he had favoured the evidence given by Cordia's health and safety manager, that the steps taken were sufficient to comply. Furthermore, he took the view that the evidence of Mrs Kennedy's expert should never have been admitted in the first place. Health and safety, he said, was not a valid area of expertise because it represented no recognised body of science or experience. The Court, he said, was perfectly competent to deal with the issues raised by compliance with the Directives, and no additional expert opinion was needed!

### At the Supreme Court

The Supreme Court did not agree with the finding of Lord Brodie. The expert witness, it said:

- had considerable **experience and qualifications in health and safety**
- was a member of a group with **specific interests in slipping at work**
- had **studied many international papers** on the subject, and
- had the **necessary experience and qualifications to explain how anti-slip attachments reduced the risk of slipping**.

The expert's evidence on factual matters was also relevant and admissible, and it was acknowledged that **experts can and often do give evidence of fact as well as opinion**.

The Court conceded that some of the expert's statements might appear to be inadmissible expressions of opinion on the respondent's legal duties. However, the Court believed that an experienced judge could treat the statements as opinions as to health and safety practice, and make up his own mind on the legal questions. Taken as a whole, the expert's factual evidence was considered to have been of value and likely to have been a help to the Court. In short, Lord Brodie had erred in ruling it to be inadmissible.

The Supreme Court noted the Australian case of *R -v- Bonython*[3] which offers guidance on when expert evidence is admissible. The case identified two grounds that must be established before admitting expert evidence.

1. Is the subject matter such that a person without instruction or experience in that area of knowledge can form a sound judgment without assistance from those possessing special knowledge? Does the opinion form part of a body of knowledge that is sufficiently well organised and recognised to be regarded as reliable?
2. Has the expert acquired by study and experience sufficient knowledge to render his opinion of value in resolving the issues?

Considering its decision, the Court recited the current law on admissibility but acknowledged the difficulties that arise with an area of knowledge not recognised as a scientific discipline. In such cases it was also necessary to demonstrate that the methodology and validity of the body of knowledge was sufficiently developed to render the evidence admissible.

The Supreme Court was satisfied on all counts that Mrs Kennedy's expert satisfied the requirements. Having regard to the evidence of the expert, both as to his opinion and on the admissible factual evidence, the Court held the following.

- The employer was aware of the risk.
- Its assessment should have recognised that employees were exposed to the risk of slipping on snow and ice, which was obvious and was within its knowledge.
- This risk had been identified in two separate assessments and the employer was aware that other employers had suffered such incidents.
- No consideration had been given to the possibility of personal protective equipment.
- The precautions taken, in the form of advice to wear appropriate footwear, did not specify what might be appropriate.

The Court was entitled to the conclusion, therefore, that the employer was in breach of the Regulations. Furthermore, its failure to provide protective footwear had materially contributed to the accident. Accordingly, Mrs Kennedy's appeal was allowed.

### Scottish cost pressures on expert evidence

In the course of delivering the Supreme Court's decision, Lord Reid and Lord Hodge passed some interesting comment in relation to the admission of expert evidence in the Scottish courts.

In common with other UK jurisdictions, there are concerns about the disproportionate cost of civil litigation. Much of the concern has centred around the increased reliance on expert evidence and the attendant costs. The Scottish Legal Aid Board had expressed such concerns to the Scottish Civil Courts Review, and these had also been voiced in the Taylor Review of Expenses and Funding of Civil Litigation in Scotland (2013). Consequently, there had been a tendency by the Scottish courts to impose tighter control over the use of expert evidence. It was implicit that such considerations had been in the mind of the lower court. Indeed, Mrs Kennedy's employer, Cordia, in opposing the admission of the evidence had referred to '*the largely uncontrolled proliferation of experts*'.

Lord Brodie may have concurred with this, but the Supreme Court, in following the reasoning in *British Airways*, could see no good ground for excluding the evidence. It was noted that the courts have considerable powers and discretions to deal with questions of expert evidence by case management. Furthermore, there would be adequate opportunities for judges to decide whether expert opinion was needed and, if so, to guide the parties towards a narrowing of the issues and reaching agreement on matters not in dispute.

***Supreme Court disagrees: judges will not be swayed by such evidence***

**References**

[1] *British Airways plc -v- Spencer & Others (present trustees of the British Airways Pension Scheme)* [2015] *EWHC* 2477 (*Ch*).

[2] *Kennedy (Appellant) -v- Cordia (Services) LLP (Respondent) (Scotland)* [2016] *UKSC* 6.

[3] *R -v- Bonython* [1984] 38 *SASR* 45.

# Europe: in or out – an expert-specif

*EU regulation helps experts give evidence across borders*

There will be many views about the benefits, or otherwise, of Britain's membership of the European Union (EU). As the impending referendum looms large, we have been taking a look at the current EU regulations that apply specifically to expert witnesses.

Efforts to regulate and harmonise the justice systems in Member States have, of course, resulted in numerous measures that affect experts working in the EU.

One regulation (the Taking of Evidence Regulation (Regulation (EC) 1206/2001)), in particular, makes things very much easier for experts operating in cross-border proceedings – especially in cases where they may not be familiar with the foreign court, legal procedure or language. The regulation applies to civil and commercial trials taking place in a court in any Member State (other than Denmark) and is designed to make it easier to take evidence (both factual and expert) from witnesses resident in another Member State.

For example, suppose an aeroplane owned by a German company takes off from Heathrow bound for Italy and crashes in Belgium. The family of a Dutch passenger sues the airline. Let's assume that proceedings are issued in a Member State outside the UK, but that the key expert witness is a British air accident investigator. The foreign court is keen to obtain evidence from that witness but it may be difficult for the expert to travel, he may be reluctant to give his evidence because he is not familiar with the country or its laws, or he may have no understanding of the language in which the proceedings are to be conducted.

In such circumstances, the regulation provides two possible ways in which the expert can be helped to give his evidence. Both rely on the court in which the proceedings are being conducted (the requesting court) making a request to the court in the State in which the expert resides (the requested court). The evidence can be taken in two forms.

- Under Article 1(1)(a) of the regulation, the requesting court can ask the requested court to examine the witness and send a transcript of the evidence. The requesting court will be responsible for translating the transcript for use in the local proceedings.
- Alternatively, if the expert speaks the necessary language, under Article 17 the requesting court can take the evidence directly from the witness via a video link to the requested court.

*UK law also has procedures to deal with such matters*

For the regulation to apply, proceedings must have been commenced or contemplated in the requesting court. Furthermore, the request is limited to evidence that a party intends to use in those proceedings. It is *not* permissible to request evidence pre-action to, for example, assess the worth or merits of a claim or for any other purpose not connected with the litigation.

Aside from the powers conferred by Article 17, it is still possible for the court of a Member State to independently appoint an expert to take evidence directly in another Member State.

The UK, too, has its own system that provides an alternative to (but not a replacement for) the EU regulation. It is contained in the Evidence (Proceedings in Other Jurisdictions) Act 1975 which governs requests for evidence from foreign jurisdictions. The Act applies to all jurisdictions, not just those in the EU, and can be used, for example, to frame a request to the court of the United States. It is also commonly used in applications between different jurisdictions within the UK.

A Member State is free to choose whether to make an application under the EU regulation or, instead, to rely upon provisions in national legislation. Although, in theory, the requesting court will use the simplest and quickest route and is free to choose which, English courts have indicated that EU courts should use the Taking of Evidence Regulation, and that any request made under the 1975 Act will be returned. This is somewhat surprising because it gives the court less discretion to refuse the request than it would have under the 1975 Act.

### How is a request made?

Article 1 requests must use Form A, which is appended to the Regulation. The request must be submitted in the fastest possible way (usually by fax) to the requested court which must then respond to the request within 7 days.

Article 1 requests are required to be executed 'without delay' and, at the latest, within 90 days of receipt of the request. If, for some reason, the court is unable to do so, it should notify the requesting court of any grounds for the delay and give an estimated time for execution.

It should be mentioned that English courts often miss the 90 day time limit because they choose to start the clock when the witness gives evidence, rather than when the requesting court makes the initial approach. All this is much to the chagrin of the European courts!

The requesting court is able to mark the application in Form A as urgent and ask that it be expedited. The Royal Courts of Justice has indicated that it will do its best to comply with an expedited request, but cannot guarantee to do so.

Form A can also include a request for the examination to be conducted in accordance with a special procedure provided for by the law of the appropriate Member State (Article 10(3)). The requested court is expected to comply unless there is a conflict with its national law or there is some major practical difficulty. The experience of English courts is that 'special procedure' usually involves some type of rule of privilege of which the witness should have specific prior notice.

In England and Wales a request is dealt with initially by the Treasury Solicitor. The witness is

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treated, for the purposes of any examination, as a witness under oath and will be served with an order to attend a designated court on a particular date and time to provide the requested evidence.

### How is the examination conducted?

English courts have quite a wide discretion as to how the examination of a witness is conducted. A court may order that an examination is undertaken by any fit and proper person nominated by the Treasury Solicitor, an examiner of the court (a practising barrister or solicitor appointed by the Lord Chancellor), or any other person whom the court considers to be suitable (Civil Procedure Rules (CPR) 34.15, 34.18).

Examination of the witness will take place before one of the approved examiners appointed to the court's panel. Outside London this may often be a District Judge. It will usually be held in open court, but the examiner will be responsible for overall conduct of the examination and will have the discretion to conduct it in private if necessary.

Subject to any special directions made in the order, examination will proceed as if the witness was giving evidence at trial (CPR 34.9(1)). It is possible for the requesting court to give directions relating to the manner and conduct of the examination, but this may create problems where different systems operate in the requesting and requested state, e.g. where a Member State requires an inquisitorial-style examination led by a judge. Such requests can be accommodated by an English court so long as they are regarded as compatible with English law.

The EU is very keen on the use of technology, such as video conferencing and recording. However, even if one of these methods is used, English courts still require that there be a full written record (CPR PD 34a(4.3)). If the evidence is not recorded in writing, word for word, the written record must contain as near as possible the full statement given by the witness. The examiner will then sign the written report and, together with the witness, will initial any amendments to it (CPR PD 34a(4.12)). The examiner will also certify any transcript of an audiotape of the examination.

### Compellability

An English court will not compel a witness to give evidence that the witness could not be compelled to give in civil proceedings before an English court or the requesting court.

The witness may object to giving evidence at various stages, and Article 14 states that a request for the examination of a witness shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence under the laws pertaining in the requesting court's Member State (e.g. on matters of privilege).

Whether or not the requested court will take steps to compel attendance is a grey area. On the whole, though, it is unlikely that the English courts would do so. It is possible, however, to a make partial execution where only some of the questions attract legal protection from examination.

The Treasury Solicitor has stated that, in practice, when an English court receives a request, the Senior Master will examine it and strike out any questions that are not permitted.

### Costs and expert fees

Article 18(1) provides that the request shall not generally give rise to any claim for reimbursement of taxes and costs. However, there are exceptions to this, one of the most important being the fees paid to expert witnesses. Another exception relates to the costs associated with any special procedure under the Regulation, such as the charges associated with using a video conferencing or teleconferencing facility (Article 18(2)).

The requested court's entitlement to recover such allowable costs from the requesting court does not extend to any witness expenses payable to the witness under national law. It might, however, be possible to recover fees of interpreters and translation costs.

In the case of expert evidence, the requested court may ask the requesting court for an adequate deposit towards the cost of seeking an expert opinion (Article 18(3)). If the requesting court fails to make such a deposit or advance within 60 days of the request, this will be a ground for refusal of the request.

### Can the expert's report be used for another purpose?

The simple answer is 'No!' Unless permission of the requesting court is obtained, or the expert witness who gave the evidence consents, evidence proffered under the Taking of Evidence Regulation cannot be employed for a purpose other than the litigation for which it was obtained (see *Dendron*[1]).

An exception to the rule on collateral use is made in the case of mediation within the particular litigation.

### Conclusion

None of this is likely to swing any expert's vote in the forthcoming referendum, though. But with much of the country's commercial business being transacted with EU Member States, it does illustrate one of the ways in which harmonisation of laws and cooperation between jurisdictions has made life a little easier for cross-border experts.

Possibly, the pertinent question in the context of the referendum is: Would the 1975 Act keep matters running smoothly should the EU regulation fall away?

***Would leaving the EU disadvantage the UK expert?***

**References**

[1] *Dendron GmbH & Others -v- Regents of the University of California & Another* [2004] *EWHC* 589 (*Pat*).

# Pilot schemes for flexible trials

*MoJ seeks options for more flexible justice*

In October 2015 the Ministry of Justice launched two schemes seeking to lessen the time and expense that trials exert on its over-stretched budget. For the last 5 months the Shorter Trials Scheme (STS) and the Flexible Trials Scheme (FTS) have been running as pilots at the Rolls Building, London and are to continue until the end of September 2017. (If you're used to dilapidated court buildings out in the sticks, the virtual tour of the Rolls Building on the *judiciary.gov.uk* website may be an eye opener!)

The aims of the FTS and the STS are set down in paragraphs 2 and 4 of the Shorter and Flexible Trial Procedure Guide. It states that these are:

> *'... to achieve shorter and earlier trials for business related litigation, at a reasonable and proportionate cost. The procedures should also help to foster a change in litigation culture, which involves recognition that comprehensive disclosure and a full, oral trial on all issues is often not necessary for justice to be achieved. That recognition will in turn lead to significant savings in the time and costs of litigation.'*

The pilot scheme is limited to trial proceedings in the Rolls Building in Fetter Lane, London, which houses the Chancery Division (including the Patents Court and the Companies Court), the Commercial Court, the London Mercantile Court and the Technology and Construction Court.

Apparently it is the intention that the pilot schemes will be monitored and, if necessary, refined. If successful, the schemes will be introduced permanently. Furthermore, those provisions seen to work may well be incorporated into the Civil Procedure Rules (CPR).

### Shorter Trials Scheme

*Shorter trials designed to fit commercial timeframes*

The architects of the STS claim that it will offer dispute resolution on a commercial timescale. Cases will be case managed by specific judges with the aim of reaching trial within approximately 10 months of the issue of proceedings. Judgment may be expected within 6 weeks thereafter. The procedure is intended for cases that can be fairly tried on the basis of limited disclosure and oral evidence. The maximum length of trial would be 4 days, including reading time.

If proceedings fall within the scope of the scheme, participation is currently voluntary with the agreement of both parties. CPR PD 51N (2.15) provides that, when considering applications for transfer, the court must:

- bear in mind the **overriding objective of the CPR**
- be mindful of the **type of case** for which the scheme is intended and the **suitability of the case** to be a part of the scheme, and
- take notice of the **wishes of the parties**.

However, while the guidance states that the scheme is not mandatory, the wording of the Practice Direction appears to imply that the court may make an order that a case is deemed suitable – perhaps leaving the way open for a more dictatorial approach to be taken.

Transfers both in and out of the scheme are provided for in CPR PD 51N (2.14) which states that the court may, under its own initiative, 'suggest' that a case be transferred into the STS.

Types of case that will not be considered suitable for participation in the scheme are set out in CPR PD 51N (2.3). These are:

- fraud or dishonesty claims
- multiple issue or multi-party claims
- where extensive disclosure is required, and
- particulars of claim longer than 20 pages.

### Key provisions of STS

Key provisions of the STS include:

- **simpler application procedures** with the option for these to be made in writing or by telephone
- **requirements for any counterclaim to be served together with the defence, any reply and any defence to a counterclaim**
- an **abbreviated, issue-based approach to disclosure**, with no requirement to volunteer adverse documents (Instead, the parties will be expected to present their case with just the evidence upon which they seek to rely. This approach shares similarities with adjudication proceedings.)
- **limited witness evidence**, and
- **shortened timescales**, with trials to take place no more than 8 months after the case management conference, the trial to last no more than 4 days and judgment to be given within 6 weeks thereafter.

The procedures in CPR PD 51N (2) will apply in place of the usual pre-action protocols.

The usual costs management provisions will not be applicable. A new system of speedy assessment (see CPR PD 51N (2.57–2.58)) will take their place, and costs will be assessed summarily by the trial judge. The parties will be required to exchange simultaneously schedules of costs containing sufficient detail of the costs incurred at each stage in the proceedings. Costs will then be assessed on this basis following judgment.

Save in exceptional circumstances, the court will make a summary assessment of the costs of the party in whose favour any order for costs is made, and CPR 44.2(8), CPR 44.7(1)(b) and Part 47 do not apply.

Once it is agreed, or ordered, that a case is suitable for the STS, CPR PD 51N (1.5) imposes a duty on the parties and their representatives. They will be expected to cooperate with, and assist, the court in ensuring that the proceedings are conducted in accordance with the scheme. This will include identifying the real issues in dispute at an early stage and dealing with them as efficiently as possible.

### Flexible Trials Scheme

The FTS announces itself as a procedure adopting *'... more flexible case management*

*procedures where the parties so agree, resulting in a more simplified and expedited procedure than the full trial procedure currently provided for under the CPR.'* Its aim is to reduce costs, to minimise the time required for trial and to enable earlier trial dates to be fixed (CPR PD 51N (3.3)).

Essentially the FTS lays down a framework within which the parties will be expected to operate, but it gives considerable scope for them to vary and agree adaptations of the procedure to suit their own particular case. Parties are encouraged to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of the dispute.

The court will endeavour to support the parties in any variations agreed but will retain ultimate control over the procedure to be adopted.

### Key provisions of FTS

Key provisions of the FTS include the following.

- Parties will be expected to agree and follow a **truncated procedure**.
- Although the court may call for oral submissions, the **evidence and submissions should be given and made in writing whenever possible**. Oral expert evidence will be restricted and limited to specific issues.
- It will be necessary to **put only the principal parts of the case to the witness**.
- There will be **limited disclosure**. Adverse documents will be required to be volunteered, but there will be no requirement for a search. When giving disclosure, a party may request specific disclosure from the opponent. The parties will not be required to provide a disclosure statement save where responding to a request for specific disclosure.
- **Trial time and costs will be reduced**.
- There will be **limitations on the length of witness statements**; the **number of documents and oral submissions will be time-limited**.

In the case of any conflict between the FTS trial procedure and other provisions of the rules or Practice Directions, CPR PD 51N will take precedence. For this purpose, the FTS trial procedure will encompass pre-trial disclosure, witness evidence, the provision of expert evidence and submissions at trial. However, it appears that, unlike the STS, the definition of trial procedure under the FTS does not extend to pre-action procedures, the commencement of proceedings, case or costs management or the assessment of costs.

If the case is considered suitable, parties wishing to use the FTS procedure should agree to do so prior to the first case management conference and inform the court of their intention (CPR PD 51N (3.6)).

### Expert evidence

Under both the STS and the FTS expert evidence at trial will be given, wherever possible, by written reports. Oral evidence shall be limited to identified issues, as directed at the case management conference or as agreed subsequently by the parties or directed by the court (CPR PD 51N (2.46)).

With regard to witness evidence generally, the schemes enable the parties to agree to invite the court to determine identified issues on the basis of written evidence and submissions. In such a case, while the court will seek to comply with the parties' request, it may call for oral evidence to be given or oral submissions to be made on any of the identified issues if it considers it necessary to do so.

Where an issue is to be determined in writing, it is not necessary for a party to put its case on that issue to the other party's witnesses. This, presumably, includes expert witnesses.

### Consequences for experts

The emphasis on shortened and truncated procedures is likely to have a quite far-reaching impact on expert evidence... if these schemes work as the Court intends. Aside from the reduced opportunities for experts to attend hearings and proffer oral evidence, it is likely that expert reports will be expected in a shortened format.

Provision is made in the scheme for the length of witness statements to be limited. While no specific mention is made regarding the length of an expert report, it seems likely that such reports will be expected to comply with the general spirit of the scheme, i.e. to exclude any 'extraneous' material and to restrict themselves to essential issues. Practitioners will be expected to ensure compliance under CPR PD 51N (1.5).

Provisions relating to limited disclosure will also have application to matters of expert evidence. Previous expert reports or pre-action reports from expert advisers need not, it seems, be disclosed under the STS unless (i) they are documents upon which the disclosing party intends to rely or (ii) disclosure is being made in response to a specific request or an order of the court.

Previously, even if privilege in a document could be claimed, it was still necessary to disclose its existence. However, the STS imposes no requirement to volunteer adverse documents. The abbreviated, issue-based approach of the FTS does require disclosure of adverse documents, but it will not be necessary to carry out a search.

There remains some doubt regarding the issue of disclosure under the STS. It has been suggested that the requirement under the STS for documents to be disclosed where the opponent has requested them or the court has so ordered will operate to provide a mechanism that would, in most cases, lead to the disclosure of adverse documents. However, this is by no means certain.

*Flexible trials remove bureaucracy to save time and money*

*STS and FTS likely to reduce the need for expert evidence*

# Services for registered experts



Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

### Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 66). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, disclosure and fees.

### Court reports – FREE

Accessible freely on-line are details of many leading cases that touch upon expert evidence.

### LawyerLists

Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

### Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version is also available. So, successful re-vetting in 2016 will enable you to download the 2016 logo.

### General helpline – FREE

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

### Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2016 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

### Profiles and CVs – FREE

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

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

### Extended entry

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

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Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

### Web integration – FREE

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### Terminator – FREE

Terminator enables you to create personalised sets of terms of engagement based on the framework set out in Factsheet 15.

### Surveys and consultations – FREE

Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

### Professional advice helpline – FREE

If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

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

### Expert Witness Year Book – FREE

Our *Expert Witness Year Book* contains the current rules of court, practice directions and other guidance for civil, criminal and family courts. It offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and contact details for all UK courts. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner.

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