Your Witness

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

How not to impress the court

Mr Justice Coulson in the case of *Van Oord Ltd & Another -v- Allseas UK Ltd* [2015] *EWHC* 3074 *(TCC)* pulled few punches in his criticism of the claimants' quantum expert. As an object lesson in how *not* to comply with CPR Part 35, it is worth reviewing the 12 points of criticism. The expert:

1. took the pleaded claims at face value and did not check the underlying documents that supported or undermined them
2. prepared his report by only looking at the witness statements prepared on behalf of the claimants and did not consider the witness statements prepared on behalf of the defence
3. valued the claims only on the basis of the claimants' assertions, despite the judge's exhortations to the experts to agree figures based on both their own and the other side's case
4. never once considered, let alone formulated, claims based upon the actual costs incurred by the claimants
5. throughout his cross-examination, was repeatedly 'caught out', culminating in the judge concluding that the admitted errors fatally undermined both his credibility and that of the claimants' claim as a whole
6. went so far as to say in cross-examination that he was not happy *with his own reports*, a fact that led the judge to say that if an expert disowns his own reports in this way, the court cannot sensibly have any regard to them
7. repeatedly accepted that parts of his reports were confusing and, on more than one occasion, agreed that they were positively misleading
8. appended documents to his original report which he had either not reviewed or had certainly not checked in any detail
9. during cross-examination, confirmed that the views expressed in his report were assertions made by the claimants' factual witnesses, assertions that had already been proved incorrect during their cross-examinations! The judge considered the expert's attempt to plug the gaps in earlier evidence to be 'subterfuge' and 'the complete opposite of what a responsible, independent expert is obliged to do'.
10. passed off a schedule as being prepared by himself when it was in fact prepared by two of the claimants' factual witnesses, and the schedule was found to include important errors which meant it had to be discounted entirely
11. accepted that instead of checking the claims himself, he had preferred to recite what others had told him, even though what he had been told could be shown to be obviously wrong, and
12. when valuing each line in the quantum claim, had not sought to use fair and reasonable rates, nor investigate whether the figures he was promoting were actually fair and reasonable or represented a windfall for the claimants. The judge found that the expert's approach rendered the whole of the valuation exercise worthless.

Clearly, the expert in this case allowed himself to become the claimants' mouthpiece, resulting in his evidence being discounted in its entirety. No doubt serious cost consequences will follow!

MedCo takes (some minor) action

MedCo has suspended users who appear to have been intentionally 'gaming' the random allocation of experts that lies at the heart of the RTA portal system. So far it has suspended 20 Authorised Users (they must presumably be law firms or MROs) who have each been asked to explain their conduct.

An unknown number of other users have been identified as manipulating the search function, and MedCo is in the process of making contact to enforce User Agreement Compliance Procedures. These include warnings, suspensions and even termination of the use of its system.

Well, when you get embroiled at this 'sausage machine' end of the litigation spectrum, it seems you have to expect such behaviour!

Clinical negligence at fixed cost

The Government is investigating the extension of fixed recoverable costs across all civil litigation, including how to deal with differences between different types of litigation, according to civil justice minister Lord Faulks. His announcement came as Law Society Chief Executive, Catherine Dixon (formerly head of the NHS Litigation Authority), said she was 'astounded' that the Government would contemplate introduced fixed costs for clinical negligence claims worth up to £250,000.

It now appears to be impossible for the Government to stick to its plan to implement fixed costs in clinical negligence cases from October 2016. Indeed, the Government's consultation, first scheduled for autumn 2015, still hasn't been published, and it seems it will not be until after the EU referendum on 23 June. If lawyers think it's hard to predict costs in such cases, experts will be just as hard pressed to read their crystal balls!

Chris Pamplin

Inside

Issue 84

A civil report drawn into a criminal

Civil expert report can be requested in a criminal case

An expert contacted the *Register* Helpline recently to ask whether he was obliged to hand over to the Crown Prosecution Service (CPS) a report he had prepared for use in earlier civil proceedings. The expert also had doubts about the direct application of the contents of the civil report to the matters at issue in any criminal proceedings, and asked what scope he had to raise these concerns and whether he was entitled to qualify some of the points contained in his original report.

Who owns the report?

It is usual for an expert report to belong to the party who paid for it, a position controlled by the expert's contract. In the majority of cases this will be the original instructing solicitor, or his client. But, regardless of who holds the copyright, the report's use in court proceedings will ***not*** breach that copyright. (See *Your Witness* 35 for a discussion of copyright, and *Your Witness* 50 for a discussion on the retention of documents.)

If it is just a copy of the report that is required, and there is no intention to call the expert as a witness (whether as an expert witness or witness of fact), there are existing procedures in place to obtain copies of the report without necessarily involving the expert. So far as expert reports on the court file are concerned, the position is governed by Civil Procedure Rule 5.4C(2) which states:

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

See '*Access to expert reports by parties not involved in the case*' in *Your Witness* 72 for a full discussion.

What can the documents be used for?

The requirement for permission is a 'safety valve' intended to allow **access only to documents that should be provided in legitimate circumstances**. There is no unfettered right of access to the court file other than in accordance with the court rules and practice directions.

Expert reports can be obtained direct from the court

It has always been necessary to **identify the documents, or class of documents, for which permission is sought and the grounds relied upon**. The main reason for this given by the courts has always been that access to court files is one of the principles of open justice and that it is necessary to monitor that justice is done, particularly as it takes place.

However, the principal has been extended over the years to cover some requests which, on the face of it, have nothing at all to do with open justice, e.g. applications that were obviously commercial or were simply seeking out *potentially* useful information in respect of, for example, collateral litigation or investigative journalism.

In *Cooperative Group Ltd -v- John Allen Associates Ltd*[1], the judge stated that there was no particular requirement for the court to give permission for a party to use an expert report disclosed by another party, or a non-party, as evidence at trial and, on the face of it, they should be free to do so. However, the fact that the experts themselves could not be cross-examined would mean that the weight given to such evidence would be 'much less' than expert evidence supported in oral evidence. The judge also made it clear that **the party wishing to rely on the report could not cherry pick**. Once a report was relied on in evidence, the court must take account of the whole of that report, so far as it was relevant, and a party could not choose which parts of the report should be given in evidence.

It would appear, then, that lawyers acting for either the prosecution or defence in criminal proceedings might legitimately seek a copy of an expert report from the files of the civil courts, and that such a request is likely to be granted.

Requests to the expert to produce copies

Assuming that the CPS lawyer (or whoever) does not seek to obtain a copy of the expert's report by direct application to the civil court, **is the expert obliged to voluntarily produce a copy on request?** Assuming, for the moment, that the expert is merely requested to produce the document, and is not being called as an expert witness, the simple answer is **'No!'** There is no general obligation to produce a document or attend court unless a summons has been obtained and served. **Until a summons is in place, the court has no power to make any order relating to the production of the document or the attendance of a witness**.

Witness summons

An expert who might be reluctant to comply with a voluntary request, for whatever reason, may **require the requesting party to first make application to the court**. Furthermore, the expert may have no mechanism for **formally challenging the validity of the request or the relevance of the requested document** without an application for a witness summons being made.

The issuing of a summons is governed by s.2 of the *Criminal Procedure (Attendance of Witnesses) Act 1965* which provides:

> (1) This section applies where the Crown Court is satisfied that –
> (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
> (b) the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing.
> (2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to –
> (a) attend before the Crown Court at the time and

place stated in the summons, and

(b) give the evidence or produce the document or thing.

(3) A witness summons may only be issued under this section on an application; and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

(4) Where a person has been committed for trial [or sent for trial under section 51 of the Crime and Disorder Act 1998] for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after the committal.

(5) Where the proceedings concerned have been transferred to the Crown Court, an application must be made as soon as is reasonably practicable after the transfer.

It will be noted that the key to the application is *materiality*. The **summons can only be issued in relation to the production of such documents as will be material and of demonstrable evidential value in the proceedings**. Unlike when requesting reports from court, it is not enough to satisfy the court that these *may* offer up legitimate lines of inquiry. The document to be produced must have a direct bearing upon the issues in the proceedings and speculation should have no place in the process.

The summons must be sufficiently detailed to indicate **what material the person is likely to provide**, and it is good practice to explain in some detail **why the material is of relevance** to the proceedings. The summons should not simply ask for a plethora of items, but should identify what is relevant and why.

There is nothing inherently wrong with a witness (whether expert or not) requiring a summons to be issued, and the court will not automatically take an adverse view of a witness who does not wish to attend or produce documents voluntarily. Sometimes, for example, a witness will not be able to take time off work without a formal summons being issued. Alternatively, as in this case, **the summons procedure may be the only opportunity the expert may have to explain to the court why he thinks the report, in whole or in part, is not material or relevant in the criminal proceedings, or why it may need to be qualified** in certain respects.

Once a summons is granted and issued, the person upon whom it is served must attend at the location, date and time specified in the summons. Where documents, or other objects, are required, these must also be identified within the summons. The rules governing the challenging of a summons are contained in Civil Procedure Rule Part 28.

Compellability

We have considered above the position where there has been merely a request for the production of a document. But what if the prosecutor also sought to call the expert as a witness?

The position is rather different depending on whether attendance is required as a witness of fact or as an expert witness. English courts will generally **oblige a witness of fact to testify to a fact in issue**. They **will not, as a rule, require an expert to give expert evidence against his wishes** in a case where he has had no connection with the facts or the history of the matter in issue (*Seyfang -v- Searle & Co*[2]). This was accepted as laying down a general principle in *Lively Ltd -v- City of Munich*[3] when Kerr J said:

> *'There are many reasons why experts should generally not be compelled to appear as witnesses in proceedings against their wishes if the evidence can be obtained elsewhere and if they have not been concerned in the matter professionally or in any other way.'*

Both cases were followed in *Harmony Shipping Co SA -v- Davis*[4], although Lord Denning alone took the view that an expert should be in the same position as a witness of fact and that the court was entitled to have his evidence, except for any matter protected by legal professional privilege.

In *Society of Lloyd's -v- Clementson*[5], the Court of Appeal held that **the court has discretion to decide whether to compel an expert to appear against his wishes**. The discretion is fairly broad, and the court will take account of the following:

- that a court is, on the face of it, **entitled to every man's evidence**, whether of fact or opinion
- whether the expert has some **connection with the case** in question
- whether he is **willing to attend**, provided that his image is protected by the issue of a [summons]
- whether attendance at court will **disrupt or impede other important work** he has to do, and
- whether **another expert of equal calibre** is available.

Conclusions

In conclusion, the expert who called our Helpline was not obliged to voluntarily produce a copy of his report, although he could probably not have prevented a copy being obtained from the court file by direct application. If he wished to oppose production, or to qualify the relevance of the document or its validity in the criminal proceedings, he could ask that a witness summons be obtained and then set out any objections. An expert's concerns can include specific comments in relation to the contents and intended use, as well as any broader grounds for objection, such as confidentiality, privilege or public policy.

If he had been called as a witness of fact, he would likely have been compellable. The issue of compellability would have been much less certain if he'd been called as an expert witness.

Witness summons process can alert the court to any concerns

References

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

[2] *Seyfang -v- Searle & Co* [1973] *QB* 148.

[3] *Lively Ltd -v- City of Munich* [1977] 1 *Ll R* 418.

[4] *Harmony Shipping Co SA -v- Davis* [1979] 3 *All ER* 177.

[5] *Society of Lloyd's -v- Clementson (No.2) Times, February 29,* 1996 *(CA).*

Consumer law, litigants in person a

Consumer law applies to all contracts with litigants in person

Until recently, it was rare for an expert witness to contract direct with a litigant. Indeed, having a lawyer as a buffer between you and the litigant is generally a very good thing, not least when your independence leads you to express opinions the litigant doesn't like! However, the savage cuts in public funding and restrictions on cost recovery mean that courts are seeing a massive increase in the number of litigants in person (see *Your Witness* 71). As a consequence, more experts are being asked to work direct with 'consumers', and it opens a whole new can of worms.

Consumer law landscape

The *Consumer Contracts Regulations 2013* ('CCR') and the *Consumer Rights Act 2015* ('CRA') have ushered in some significant changes to the law in relation to consumer contracts for the supply of goods and services. Experts who are instructed by litigants in person, and create contracts with them, need to be aware of the new consumer law landscape. For the avoidance of doubt, **when contracting with a law firm in the course of its business, consumer regulations will have no application**.

Definition of consumer

The CRA defines 'consumer' as:

> '*... an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.*'

It will be apparent from the word 'individual' that a legal entity, such as a company or a limited liability partnership, cannot be a consumer, although a sole trader or individual partner can contract as a consumer.

The second limb of the definition stipulates that the contract must be '*wholly or mainly*' outside the individual's trade, business, craft or profession. It means that an individual can act as a consumer if the purpose is mainly for consumer use, even if it includes some element of business use. This creates a somewhat grey area because the extent to which consumer and business can be mixed is by no means certain. It is clear, however, that the overwhelming balance of the purpose must fall outside the individual's trade or business.

Experts provide a service, not goods

Most experts will fall clearly into the 'trader' category when offering expert witness services, and in contracts entered into in England and Wales, it should be reasonably apparent whether you are contracting with a 'consumer'.

Contracts for services

Expert contracts will, of course, relate almost exclusively to the supply of professional services. Accordingly, those provisions of the CCR and CRA that apply to contracts for the sale or supply of goods will not be relevant. Contracts for services are not defined specifically under the Acts, but it should be self-evident in most cases whether provision is for services or goods under the contract.

Experts who contract with consumers

Experts who contract directly with an individual litigant (or a group of litigants) will bring themselves within the ambit of the consumer legislation and will need to comply with the provisions. Where applicable, the main provisions are as set out below. In the following, under the regulations the term 'expert' should be read to have the meaning of 'trader', and 'litigant' the meaning of 'consumer'.

Statutory rights under CRA

Every contract to supply a service is to be treated as including an implied term that:

- the expert must **perform the service with reasonable care and skill** (s.49)
- if it is taken into account by the litigant, **anything said or written to the litigant by the expert about the expert, or the service, will be treated as included as a term of the contract** (s.50). This presumption is subject to any qualification communicated by the expert to the litigant on the same occasion, and/or any changes that have been agreed expressly between the litigant and the expert. Note that **this will include any professional CV, website, LinkedIn profile or advertising material that the consumer employs in his decision to contract with you**.
- a **reasonable price will be paid** for the service (s.51). This section applies in contracts where the litigant has not paid upfront for the service and the contract does not expressly fix a price or other consideration, and does not say how it is to be fixed. In this case, the contract is to be treated as including a term that the litigant must pay a reasonable price for the service, and no more. Exactly what is a reasonable price is a question of fact. However, this is clearly not an area in which an expert will want to get involved, so it is sensible to set out explicitly the fee for the work to be done.
- the **service will be provided within a reasonable time** (s.52). If the contract does not expressly fix the time for performance and does not say how it is to be fixed, this section will apply. As with price, 'reasonable time' will be determined as a question of fact.

In the event of a breach by the expert of any of these terms, the litigant is entitled to seek a remedy under s.54 according to the nature of the breach or the circumstances. This includes:

- the right to require **repeat performance**, and
- the right to a **price reduction**.

The litigant may also pursue one of the common law remedies, either in addition or as an alternative, provided that it does not lead to a situation where the consumer recovers twice for the same loss. The common law remedies include:

- a claim for damages
- recovery of money paid where consideration has failed

- specific performance
- an order for specific implementation
- relying on the breach in defence of a claim by the expert or by way of counterclaim, and
- rescission of the contract.

To summarise, then, when contracting with litigants, experts should be aware that **any statements made, whether verbal or written, can be incorporated into the agreement by implication unless they are expressly excluded**. The expert should also avoid the application of s.50 and s.51 by having clear terms in the agreement relating to price and time for performance. If it is not possible to fix an exact price or time, then the terms should identify clearly how these are to be calculated. Hourly rates, etc., should, of course, be specified. Furthermore, if there are likely to be additional charges or expenses and they cannot be reasonably calculated in advance, the terms should, at least, record the fact that such additional charges may be payable. In the case of a contract of indeterminate duration, the terms should set out the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs, if applicable.

Statutory rights under CCR

The main provisions of the CCR with application to consumer contracts entered into by experts will be those relating to:

- **off-premises contracts** – selling your service face to face but away from your business premises, e.g. contracts made in the litigant's home or workplace
- **distance selling** – sales of your services without face-to-face contact with the litigant, e.g. online or by telephone through an organised distance sales system)
- **on-premises contracts** – any contract that is not off-premises or distance selling, and
- **cancellation**.

While it may seem likely that an expert who receives an email asking for help in some litigation will fall into the distance selling category, the lack of an 'organised' distance selling scheme may well be sufficient to convince a court that this most common scenario for experts will set up an on-premises contract, despite the lack of face-to-face dealings.

The CCR make provision for certain categories of information that must be supplied dependent on whether the contract is made on-premises, off-premises or at distance.

A trader contracting for the supply of goods is obliged to remind consumers of the legal duty to supply goods that are in conformity with the contract. However, experts contracting for the supply of *services* will not have to meet this demand because there is no equivalent requirement in respect of services.

For on-premises contracts the expert must state:

- the **main characteristics of the goods or services**. The description should be sufficient to enable the litigant to understand the nature of the service and to ensure that they are in a position to make informed decisions about their matter.
- the expert's **identity**, including any trading name, address and telephone number
- the **total price of the goods or services, including all taxes** (but where this cannot be calculated reasonably in advance, at least the basis for the charge)
- the **arrangements for payment, delivery or performance** and the **time you will take to deliver the goods or perform the services**, where applicable
- his **complaint handling policy**
- information on any **after sales services, guarantees and conditions**, if applicable, and
- the **length of the contract**, if fixed, or, if the contract is of indeterminate duration, the **conditions for cancelling** the contract.

Consumer contracts have very specific information rules

For off-premises and distance contracts the expert must ***also*** specify:

- a **telephone number, fax number and email address**, where applicable
- the **address to which complaints should be sent**
- if the contract is of an indeterminate length, the **monthly costs** (where the contract is charged at a fixed rate) or **billing period costs**. For ongoing contracts, **estimates** should be given at each stage.
- the **costs associated with using distance communication to conclude the contract if they are above basic rate**, e.g. where the contract is concluded via a telephone number charged at a premium rate
- the **conditions, time limits and procedure for exercising a right to cancel** and a notification that if the litigant expressly requests work to be started within the cancellation period, they will be responsible for paying the reasonable costs of the service
- a **notification if there are no cancellation rights for specific services**, or if there are **circumstances in which litigants will lose their right to cancel**. For instance, this would be required if the litigant asks the expert to start work in the cancellation period and the expert starts and completes the work.
- the **identification of any deposit or other financial guarantee the litigant is required to pay** and any applicable conditions.

Statutory cancellation rights may be required

The required information must be given on paper or, if the litigant agrees, on another durable medium (such as email). **Failure to provide this information is an offence** and will render it likely that the expert will not be able to recover, for example, any charges or expenses incurred after the contract is made but prior to any cancellation.

Off-premises confirmation requirements

The regulations require that the **litigant must be provided with a signed copy of the contract,**

Failure to comply with consumer law may leave you out of pocket

or confirmation of the contract, on paper or, with the litigant's agreement, some other durable medium. This is to be provided within a reasonable time after the contract has been concluded and before any service is supplied under the contract. This copy must include all the information required under the regulations unless it has already been provided prior to conclusion of the contract.

Cancellation rights under the CCR

There are, of course, common law rights to termination of a contract by a consumer in cases where, for example, a party has not performed the contract properly. Under the CCR, however, litigants can cancel contracts simply because they have had a change of mind. This provision applies where the litigant has entered into a distance or off-premises contract. In such circumstances, the **litigant will have a right to a change of mind at any time from making the offer to up to 14 days from conclusion of the contract**.

The CCR do contain provisions protecting the expert where the litigant's mind changes, e.g. permitting the expert to make the litigant pay for services provided up to the point of cancellation.

If there is a right to cancellation, in the case of distance contracts it must be given to the consumer in the **cancellation form as set out in part B of schedule 3 of the regulations**. It must also be supplied in a legible form in a durable medium. Schedule A also sets out model instructions for cancellation which can be employed if desired, although their use is not mandatory.

As well as being a criminal offence, **failure to provide the consumer with the pre-contract information about the right to cancel** may result in:

- the **consumer bearing no cost for supply**, whether in full or in part
- the **right to cancel being extended by up to 12 months**, meaning that the consumer could receive services free of charge for this period, or
- an **off-premises contract**.

Consumer law may be a another reason to avoid litigants in person

Where **services are to be provided immediately following the making of the contract and within the cancellation period, the expert must obtain the litigant's express instructions to commence the work**. The expert must inform the litigant pre-contract that payment for services received will be due if agreement to proceed is given during the cancellation period. A failure to inform will result in the litigant bearing no cost for the supply of services, whether in full or in part.

Note that where an expert is instructed to commence work during the cancellation period but fails to obtain the litigant's acknowledgement that the right to cancel will be lost, the litigant's right to cancel is not lost.

Provided the above requirements are met, the expert is entitled to charge for the supply of services provided from the point when supply begins to the time the expert is informed of the litigant's decision to cancel. The amount payable for services supplied up to cancellation must be in proportion to what has been supplied, in comparison with the full coverage of the contract. Of course, if the expert has received payment in advance for the service before starting to provide it, the question of payment up to the time of cancellation becomes more one of reimbursement for the period after cancellation.

Although there is a legal obligation on the litigant to pay for the services received up to cancellation, this is not specifically made an implied term and the expert may wish to include an express term reflecting the rules.

Conclusion

In the case of any contract made with a litigant 'consumer', experts must be aware of the requirements relating to the supply of information, confirmation of the contract and the form in which confirmation is to be given. The expert should ensure that the agreement contains clear terms relating to price and time for performance.

Experts should be wary of making any statement in relation to their services, whether verbally or in writing, because these can be relied upon by the litigant and incorporated into the agreement by implication. Where it is not intended that such statements or documents should form part of the agreement, they must be expressly excluded. Indeed, the expert would be wise to obtain the litigant's written consent to this.

It will be apparent from the above that, from the expert's point of view, there are advantages to ensuring that contracts are made on premises. If only the regulations made that easy to achieve! If an on-premises contract is made, the expert is required to provide less information, need not confirm it post contract and need not offer the consumer a right to cancel.

Where there is a right to cancel, experts should bear this clearly in mind and should make sure they have given all the prescribed information and notices. Experts should be particularly wary of commencing any work during the cancellation period without receiving express instructions to do so from the litigant. They should also make sure that, where the work is likely to be completed in its entirety during the cancellation period, the client has been notified that the right to cancellation will thus be lost.

Experts who conduct business through a website without meeting their clients face to face will need to be aware of the requirements of the regulations regarding distance selling. They will also need to make sure that their website is fully compliant with the rules applicable to distance contracts, rather than a site that merely complies with the lesser requirements for on-premises sales. The same is true for all experts who conclude contracts using online service provision platforms provided by third parties or agencies.

The anonymous expert

The tenets of open justice dictate that witnesses in court should give their evidence in the full glare of judicial and public scrutiny. In normal circumstances, this includes the naming and identifying of individual witnesses, and the risk of media attention in high-profile cases. There are, of course, some circumstances in which such publicity is undesirable. In such cases, the court has the power to make anonymity orders in respect of parties or witnesses, or else impose reporting restrictions on proceedings.

Whilst the court will necessarily be circumspect in making such orders, they are by no means uncommon, e.g. cases involving the identity of minors, or security service personnel.

Against this, the **court must balance the need for openness and transparency, freedom of speech and freedom of the press, as well as the requirements of the Human Rights Act 1998**.

Experts as a class of witnesses would appear to present the court with a particular difficulty given the nature of the expert's duty to the court, the desirability of peer review of their opinion and the weight that might be given to their particular reputation and professional standing. All of these might be compromised if they were permitted to give their evidence anonymously. One might conclude, therefore, that there are no circumstances in which the court would make an anonymity order in respect of an expert witness. This, however, is not the case, and there has been at least one recent example of the court granting such an order.

If both sides seek anonymity – look harder!

In *R on the application of AB*[1], Mr Justice Mostyn was called upon to review the decision of the lower court to grant an anonymity order that applied not only to the claimant but also to his expert witness and the country in which activities the subject of proceedings had taken place. Unusually, the order had been sought by both the claimant and the defendant, and this set alarm bells ringing immediately in the mind of the judge. As Lord Woolf reminded us in *Kaim Todner*[2]:

> '*... when both sides agreed that information should be kept from the public that was when the court had to be most vigilant.*'

The case involved an asylum seeker who had been detained in the UK pending consideration of his claim. Whilst in detention, he had kept records and documents, some of which are said to relate to his alleged membership of a certain foreign organisation. The claimant's asylum claim failed and he was deported. The claimant's case was that the Secretary of State caused confidential documents to be placed in his baggage prior to his removal. These related to his failed asylum claim and his participation in the activities of the organisation. It was alleged that, upon his arrival, the documents had come to the attention of government agents of the country to which he had been deported. He was detained and brutally tortured. The following day, by virtue of a bribe paid by his aunt to a colonel in the army, he was released and had gone into hiding. He had, however, been able to participate in the proceedings by video link from a United Nations building with the help of the British Embassy.

Expert evidence fell into two categories.

First, there was medical evidence given by a specialist in accident and emergency medicine who had opined on the probable causes of the claimant's injuries from photographs provided. The Secretary of State had also called evidence from a dermatologist in the foreign capital, who had given his evidence in French by video.

Second, there was non-medical expert evidence from a specialist who gave his opinion on the fate that might befall someone identified as a member of the organisation in the country in question, and whether it was reasonable that the Secretary of State should have been aware of this.

There was no application to protect the identities of the medical experts, but both parties had agreed that there should be an application for a wide-ranging reporting restriction order seeking wholesale anonymisation. This would prevent the identification of not only the claimant, but also his non-medical expert witness, as well as the country to which the claimant was deported, any holders of public office there, and any political parties (particularly the opposition organisation of which the claimant claimed he was a member). This had been granted by the lower court, together with an order preventing any skeleton arguments being made available to anyone other than a party to the proceedings.

Mr Justice Mostyn confessed to being distinctly uneasy. He was mindful that any reporting restriction ordered, by definition, involves an encroachment on the freedom of expression of any journalist who wants to report the matter fully. In such circumstances, section 12 of the Human Rights Act 1998 applied directly. He reluctantly agreed, however, to allow the anonymity order in respect of both the claimant and the expert, having regard to the danger that might result from their identification. However, he made it abundantly clear that if, on reading this judgment, the press wished to apply for the order to be revoked, then he would hear such an application, if necessary on short notice, at which the reporting restrictions would have to be justified anew and from first principles.

Conclusion

Notwithstanding the very unusual features of the case, it does provide authority to suggest that **the court can permit expert evidence to be given anonymously if there are questions of witness safety or other compelling reasons**.

Expert witness identity can be hidden in extremis

References

[1] *R on the application of AB -v- Secretary of State for the Home Department* [2013] *EWHC* 3453 *(Admin).*

[2] *R -v- Legal Aid Board ex p Kaim Todner* [1999] *QB* 966.

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 68). 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.

Photographs – FREE

Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photo?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

Multiple entries

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

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

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.

Software – FREE

If you opt for our Professional service level you can access our suite of task-specific software modules to help keep you informed.

Discounts – FREE

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.

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