

# Your Witness

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## That looks familiar!

We had a Helpline call recently that raised a question I'm surprised is not asked more often. The expert had written a report for a law firm many months ago, been paid and had heard nothing further. Recently the expert had a new enquiry. On receiving the papers, it quickly became clear that this new enquiry was about the same case reported on previously – but the second law firm was clearly unaware of the earlier report. For whatever reason, the first set of solicitors had chosen not to disclose the expert's report.

This situation raises three connected issues:

- **conflicts of interest**
- **client confidentiality**, and
- **privilege**.

On the question of **conflict of interest**, our expert presumed that he was precluded from acting for the second firm because of his previous involvement with the case. While that is probably the wiser course, it is not automatically mandated. It will depend on whether he is still subject to the retainer with the first firm. As Lord Denning put it, there is no property in a witness, and the fact that an expert has been instructed previously by one party does not necessarily mean that he cannot subsequently be instructed by another.

On the question of **confidentiality**, an expert's paramount duty is to the court, but he must also respect the confidentiality and privacy of others. It would be wrong to volunteer any information or opinion derived from instructions from the first firm without its express permission. However, openness and honesty in dealings is important, and when difficult situations such as this arise, it is usually best to declare it to those parties affected and either remove the cause of conflict or withdraw from the case entirely.

So far as the broader questions of **privilege** are concerned, a lawyer acting for one party must not question an opposing party's expert on matters properly protected by the doctrine of legal professional privilege, unless privilege has been waived. In this case, the second firm was not, of course, aware of the expert's previous involvement and so did not give the expert prior warning of the potential conflict or of any potential for breach of privilege. Likewise the expert will have had no forewarning of the potential conflict. Accordingly, once he had discovered the identity of the party, it would be prudent not to read further, nor to consider any accompanying documents or statements forming part of the instructions; neither should he make disclosure of any information that might risk breaching privilege.

So our advice to the expert was as follows: return the instructions of the second firm regretting his ability to accept them due to a conflict. It would be unwise to volunteer any more information than that.

## To whose benefit?

What should you do if one of your established law firm clients suddenly tells you it will no longer be responsible for your fees, but instead you should bill ABC Ltd for them?

The purpose of your terms of engagement is to set up the contractual relationship between you and those who instruct you. By separating instruction from payment, one simply increases the complexity of the contractual arrangement, and increases the risk of payment problems arising down the line. For example, in the set up proposed by this lawyer, how much hassle would it be for the law firm if its payment arm went bankrupt (taking your fees with it)? Do you suppose that would be an easier prospect for these lawyers, should things get tight, than them taking the law firm itself into bankruptcy?

The sensible approach is to take the time on the first instance of the law firm using ABC to get a set of terms together that provides you with the protection necessary given the extra party in the proceedings. If the law firm is not simply trying to off-load its financial risk to a third party, presumably it will not object to having the terms adjusted to ensure your position isn't disadvantaged by its decision to reorganise. How the firm responds to this approach may be revealing of its true motivation behind the introduction of ABC Ltd!

## Survey 2017

What is it that expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to publish the results in *Your Witness*. I have enclosed with this issue a questionnaire on your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work. This is the twelfth survey we have run, and the resulting analysis of trends over two decades is a valuable resource.

I would be grateful if you can find time to complete the short questionnaire, anonymously if you prefer, and to return it in the next few days, or you can complete it on line. Simply point your browser at [www.jspubs.com/survey2017](http://www.jspubs.com/survey2017). I will report on the results in a future issue.  
*Chris Pamplin*

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# Brexit battle plan

Brexit remains a hot topic as Article 50 is finally triggered and the UK wheels like a slow dreadnought at the Battle of Jutland to face what is fast becoming the Grand Fleet of a belligerent European antagonist.

## Civil Service Knots Committee

As European laws have become linked so inextricably with our domestic law, the untangling of this Gordian Knot should be high on the agenda. So the UK government machine has been doing what it does best – appointing committees!

Earlier this year the Justice Sub-committee of the Select Committee on the European Union met to hear oral evidence from a number of witnesses, including members of the Law Society and the Bar Council. This was the fourth such evidence session of the inquiry into the consequences for civil justice co-operation post Brexit, and what the loss of the jurisdiction of the European Court of Justice (ECJ) will mean. The stated purpose of the inquiry is, eventually, to create a report that will inform the Public and assist government in its negotiations.

The meetings have highlighted some interesting areas that should, at least, concentrate the minds of those charged with the negotiations. They also leave no doubt as to the magnitude of the task so far as civil justice and national and international laws are concerned.

As many expert witnesses know, membership of the EU has led to a huge increase in litigation with a European aspect. While access to justice has been fast eroded by public funding cuts and successive ‘reforms’ to the justice system, the harmonisation of EU laws has, at least, made it easier for the ordinary litigant to operate in the ‘European market’. It is telling, therefore, that members of the Sub-committee were anxious to know how, from a civil justice point of view, our leaving the EU might affect the ordinary citizen.

Witnesses gave several examples of how the Brussels regulations currently help provide certainty to the ordinary litigator. For example:

- if you buy a computer online from a vendor in France, it arrives but does not work
- if you are knocked down by a car in Nicosia
- if you are part of a family where somebody has come from another Member State, has lived in England for a few years, has had a child here and has then gone back to their home country.

In all these cases, EU regulations make it easier for litigants both to bring proceedings (whether in the UK courts or elsewhere) and to enforce any judgment.

Reference was made in the evidence submitted to the committee to the current ‘first past the post’ system. The example was given of a French couple, both French nationals but living in England. It is possible for either of them to start divorce proceedings in either England or France. The first past the post system means

that whichever proceeding is filed first will prevail. Under the old common law rules of *forum conveniens*, the English court would decide whether France or England was the appropriate court. This could be a costly and laborious process and was prone to misuse by those who wanted to delay proceedings.

The unanimous view was that the major benefits of the harmonisation regulations were certainty and cost effectiveness. The Law Society pointed out that the system whereby judgment was obtained in one state and recognised and enforced in another had become more or less automatic. The system was not merely limited to the harmonisation of civil justice systems, but included a myriad of other EU measures affecting people living, working or travelling in Member States, such as the various consumer law regulations, the motor insurance directive, the package holidays directive and many others.

## Can common law take up the slack?

The complexity that lies behind Brussels all adds up to give jurisdiction and allow enforcement. Whereas, pre-EU, common law provided answers and certainty, the world has moved on a bit in the last 40 years. We now live in a much more international and more European-focused UK. The question was posed that, if we do away with the Brussels regime, would the vacuum created be filled adequately by common law?

The consensus was that it would not. The hole created by the loss of European regulations would require the development of common law, and this is a time consuming and very expensive process. It would mean that parties should first litigate, allowing the courts to come to a decision that sets a precedent. In many areas, common law has stagnated because of the imposition of EU regulation, and we would have to go back 40 years in our approach to law making and try to develop common law quickly to meet the needs of the modern world.

Furthermore, while the development of common law might be adequate to deal with judgments coming from overseas, it would not help with the export of judgments to Europe. There would be much less certainty about what would happen to English judgments when they arrive in Italy, Spain, Portugal or France. There, you would have to look to the old national rules of these individual countries to see how they deal with, say, an American, a Russian or a Chinese judgment. Those rules tend to be much more protectionist, and there are many more hoops through which you have to jump to get your judgment recognised and enforced.

Certainty is key. Litigants need to feel confident that cases will be dealt with competently and fairly and will be heard according to a particular code of law, and that they will have reasonable prospects of enforcing any outcome. The quality of the courts in England and Wales has made them a favourite forum for European litigants,

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*Brexit manoeuvres  
start in earnest*

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*EU membership  
has brought  
certainty to legal  
proceedings*

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particularly in complex business and contract cases. A return to a purely common law-based system, with none of the Euro harmonisation we currently have, will certainly diminish certainty and erode confidence.

### **Mind your language Herr Junker!**

The Sub-committee heard evidence that courts in other European jurisdictions are already gearing up in anticipation of stealing lucrative work from the London commercial courts. Despite Herr Junker's recent and rather risible ruminations about the declining importance of the English language, those that really know about these things recognise that English remains the language of international law and contract. Frankfurt has already established an English language court, and the Dutch are not far behind.

There are, however, doubts about the likely success of these rival courts. Many believe that the more global litigation, which gives a lot of income to the legal sector in London, will tend not to go to an EU court. Where parties in such cases choose to opt for arbitration, London's long history in arbitration will continue to draw many. For those that choose litigation, the choice will be wider because there are now a number of strong contenders. New York is well regarded in the banking and financial services sectors, Singapore is putting in a big pitch, and even Dubai is working hard to attract work. At this high multi-national level, UK courts have led the way because they have strived to deliver a system that works. And UK courts have the advantage that their judgments can currently be enforced throughout the Commonwealth under the 1933 Act and throughout the EU. That is unique in the world. This advantage will, of course, be lost if we lose our EU connection entirely.

The consensus is, therefore, that reliance on common law would not be a good outcome. Indeed it is in the interests of ordinary litigants, businesses, the courts and their users that we negotiate some deal that will preserve reciprocity with the EU.

So what are the alternatives? The Lugano Convention is seen as very much the second choice. Most are in favour of preserving the Brussels agreement (Rome I and II) in some form or other, and this would effectively preserve the status quo. The Law Society's preference, too, seems to be that we should try to ensure access to Brussels and perhaps also to the linked frameworks. However, as most of the provisions need reciprocity across a number of different areas, it would all require separate negotiation, the prospect of which is quite daunting.

There was something to be said for prioritising those specific areas that were seen to be of particular importance, such as consumer law, family cases, insolvency, etc. Witnesses also said they would like the Government to set out some aims that it wants to achieve.

Another concern was the relationship between the ECJ and domestic UK law and institutions. It seems to us that there are two areas where a potential problem is posed post Brexit.

1. There are a number of important European decisions that currently bind the UK courts, and there would be some doubt about the status of decisions if the ECJ no longer carried binding authority.
2. Any continued relationship with our EU neighbours (in relation to both trade and legal matters) will probably be made more problematic if decisions of the ECJ are applied in the EU but not in the UK.

If access to the single market is to be negotiated, it would almost certainly be along the lines that Brussels regulations will apply. This would usually mean (as it does in the case of Denmark) that adherence to these regulations would be governed by the ECJ.

### **Taking due account**

Accordingly, if the UK is to negotiate a treaty that will allow some element of the Brussels regulations but with judicial independence from the ECJ, some way will have to be found to make such an arrangement work. It might be possible to achieve a treaty with the EU to apply the Brussels regulations without reference to the ECJ but on the basis of *due account*. This is a mechanism that would allow UK courts to draw on European decisions and to take account of the way in which law is developing across Europe, even though they were not under the jurisdiction of the ECJ.

For some lawyers and politicians, the short-term, quick-fix answer is that the UK should do what some Commonwealth countries have done when severing ties with the colonial power, i.e. to pass a law incorporating all those laws that exist at the point of severance. The State, its legislature and the courts can then, at leisure, repeal, amend and add to this body of law as they see fit and as occasion demands. However, it is a solution that only really suits the hardest of hard Brexits. If the UK is to maintain any kind of reciprocal arrangements with the EU, or wishes to have access to its markets on favourable terms, while at the same time have full independence from EU regulation and the ECJ, then some alternative treaty will have to be negotiated to suit the needs and requirements of all sides.

### **Both sides have much to lose**

It will be no easy task. And it should not be overlooked that the EU too, for all its bombast, has much to lose if it fails to deliver a reasonable outcome for its Member States whose economies are reliant on trade with the UK or whose citizens live, work or do business here. To return to our metaphorical Jutland, there is likely to be a great deal of posturing and circling before a shot is fired in anger. When it is, we might end up losing more ships but, as it was at Jutland, be judged, perhaps, to have won the battle.

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*Junker's views  
on English do not  
bear scrutiny*

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*EU bombast aside,  
both parties have  
much to lose*

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# Expert's duty of confidentiality in arbitration

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*Arbitrations, unlike court hearings, are confidential*

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Issues of confidentiality applying to proceedings held in open court are not particularly contentious because judgments, awards, transcripts and court documents will generally be in the public domain. The same is not true, though, of arbitration and other similar forms of alternative dispute resolution (ADR). With an increasing number of experts acting as witnesses, assessors or advisors in such cases, it is worth looking at the current position regarding confidentiality rights and obligations in arbitration.

## Confidentiality issues can commonly arise

There are a number of areas that pose potential problems for expert witnesses. For example, one might be asked a question in cross-examination about evidence the expert has given in other arbitration proceedings, or a previous report might be called for in evidence.

- Should an expert answer such questions or produce previous reports if asked to do so?
- Can another party make reference to an expert's earlier report?
- Can an expert be excluded from hearing other evidence, or from other parts of the proceedings, on grounds of confidentiality?
- With regard to the broader issues of confidentiality, is an expert free to talk to third parties about the proceedings or their outcome, once concluded?
- Is the expert free to make reference to any evidence or finding of the tribunal in any future report?

## Confidentiality clauses are often implied

As with much of English common law, the legal basis for confidentiality in arbitration proceedings is somewhat obscure. It has been long accepted, however, that **confidentiality is an implied term in any agreement to arbitrate** (*Dolling-Baker -v- Merrett*<sup>1</sup>). Such implied confidentiality applies to the hearing itself, all documents generated and disclosed during the proceedings (including notes, expert reports and correspondence), and the award or decision of the tribunal. In this respect, the implied term is governed by rules of contract.

When the Arbitration Act (1986) was drafted, legislators had the opportunity to codify the law and make specific provision in the Act for confidentiality. For some reason, the drafters chose not to do so – possibly because the common law position was so convoluted that they felt their time would be better spent on other matters! Instead, it was decided to allow the law to develop on a case by case basis.

The approach has been criticised by the Court of Appeal. Lawrence Collins LJ (*Emmott -v- Michael Wilson & Partners Ltd*<sup>2</sup>) has commented that:

*'... the implied agreement is really a rule of substantive law masquerading as an implied term.'*

The obvious question to ask, then, is that if the duty of confidentiality is an implied term of

the arbitration agreement, how does this bind expert witnesses who are not, of course, parties to the agreement? Again, the courts appear to have got around this stumbling block by what really amounts to another legal fiction. The common law argument is that **the expert's retainer will contain a similar implied term of confidentiality to that implied in the arbitration agreement** (*London & Leeds Estate -v- Paribas Ltd*<sup>3</sup>).

Of course, the parties to the arbitration are at liberty to vary, curtail or strengthen any implied obligations of confidentiality by inserting express clauses in the arbitration agreement. While these may safely bind the parties and the arbitrator, this leaves the position of the expert witness less clear. Will they, too, be deemed implied terms of his retainer? As a matter of contract, this is more doubtful. The expert might be wholly unaware of any express provisions, so how can he be deemed to have implicitly accepted them? For this reason, it behoves **the tribunal to make reference at the outset regarding privacy, confidentiality of documents and any specific provisions that have been made, and to ensure that the expert is aware of these and agrees to be bound**. This can be addressed during the preliminary meeting or order for directions.

It should be mentioned that some institutions that provide arbitration and ADR services have their own standard terms and conditions which often contain more specific privacy and confidentiality provisions. These include bodies such as the London Court of International Arbitration and the International Chamber of Commerce. Sometimes there are express provisions in these terms governing such matters as industrial processes, trade secrets, commercial agreements and the like. Experts should ensure that they are aware of any such provisions and their scope.

## Beware the hidden breach

In many instances, it will be obvious to the expert when a situation arises that would risk breaching his obligations of confidentiality. However, there are occasions when this might not be quite so clear.

Take, for example, a case when, in the course of cross-examination, a question is asked about an opinion the expert has given in previous arbitration proceedings, or the answer to which would necessarily reveal information the expert obtained as a result of participating in such proceedings? Such information is confidential and, unless both parties to the previous arbitration have consented, should not be disclosed by the expert witness. The expert, or the advocate, should therefore raise an objection to the question, stating the grounds upon which the objection is raised. If necessary, the expert could seek leave of the judge or tribunal to explain the grounds for the objection in private. It should be noted that **the provisions**

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*Confidentiality is most often an implied term*

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# Arbitration

of the Civil Procedure Rules (CPR) relating to arbitration claims preserve the confidentiality of arbitration in proceedings in open court with some limited exceptions.

Similar criteria apply to applications made by either side to adduce in evidence or rely on a report the expert has prepared previously for use in other arbitration proceedings.

As a general rule, **documents obtained in the course of disclosure during arbitration proceedings may only be used for the purposes of that arbitration.** This is the common law rule but it is broadly similar to the provisions of CPR 31.22 in court proceedings (which limits the use of such documents to the specific court proceedings).

There are, of course, exceptions to be made in both cases.

The **tribunal can order the disclosure of confidential evidence or documents (including expert reports) if it is deemed reasonably necessary for the establishment or protection of a party's legal rights or where it is necessary in the interests of justice or the public interest.** For example, disclosure can be ordered where evidence obtained in proceedings is necessary to found a claim by a third party or to enable them to defend a claim or make a counterclaim.

Public interest cases are less clear-cut, but disclosure has been ordered where it was necessary to ensure that a judicial decision was reached on the basis of accurate evidence (*Ali Shipping Corporation -v- Shipyard Trogir*<sup>4</sup>).

With regard to expert reports specifically, disclosure will not be ordered where they are merely useful to a party in other proceedings or would save the expense of having to be obtained elsewhere.

## Experts giving contrary opinions over time

An important exception to the confidentiality rule concerns the cross-examination of witnesses on evidence that is known, or suspected, to be inconsistent with evidence given in previous arbitration proceedings. This is particularly so in the case of expert witnesses who have provided evidence in other arbitrations that differs from their evidence in the current proceedings. A party in possession of transcripts, statements or expert reports from previous proceedings, upon which they intend to rely, should state their intention to do so. The judge or tribunal may order an adjournment while the consent of previous parties can be sought, but even if such consent is not forthcoming, they may still order disclosure and use where justified in the interests of justice or public interest. **Experts tempted to stray from a previous report in the belief that its contents are confidential will, therefore, find that it affords them no protection.** In *London & Leeds Estate*<sup>3</sup>, an expert witness in a rent review case gave evidence that conflicted with evidence he had given in a previous arbitration. The court held that such inconsistency would justify an exception to the rules of confidentiality in the

public interest and the right to justice of the parties involved.

Sometimes the content of some part or parts of the arbitration proceedings might be deemed so secretive or commercially sensitive that a party might seek to exclude third parties, including witnesses, from those parts of the hearing. Technically, they are within their rights to do so. It is, however, rare to seek such an exclusion in the case of an expert witness because experts will generally be called upon to comment on the evidence given. Consequently, unless the tribunal and both parties have agreed to this, it is doubtful whether one party could or should exclude an expert from part of the hearing unless there was some overwhelming reason for so doing.

We suspect that it will rarely happen that an expert, himself, will wish to make use of documents or reports he has received or has prepared in connection with arbitration proceedings for extraneous purposes. While not beyond the bounds of all possibility, a more likely scenario is that the expert may be approached by a third party with such a request. In those circumstances how will experts know whether the use to which the sought material is to be put will fall within one or other of the exceptions to the implied or express duties of confidentiality? The answer, of course, is that they won't. Accordingly, **experts should decline to act or to make any disclosure in cases where, to do so, would risk breaching confidentiality.** Of course, **disclosure can be made if ordered to do so by the court or tribunal.** The party seeking to make use of the material can ask for the consent of all parties to the original arbitration; notice of such consent should release the expert from confidentiality obligations within such scope as the consent confers. Additionally, the court has previously held that, even if the consent of the parties has not been given, the obligation of confidentiality may be discharged if independent counsel's opinion has been given that disclosure is justified under one or other of the exceptions (*Hassneh Insurance Co of Israel -v- Mew*<sup>5</sup>).

## Serious consequences can follow

Depending on the nature and constitution of the tribunal, breach of an obligation of confidentiality would probably constitute a contempt or a breach of the expert's duty to the court. Given the nature of the implied obligation as construed by common law, an expert who breaches this could, additionally, be sued for damages resulting from any disclosure. Experts might also fall foul of any duty or obligation imposed by their professional body, such as to amount to a serious professional misconduct.

This all gives experts some serious matters to ponder before, during and after the conclusion of any arbitration proceedings in which they might be involved.

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*Breaching confidentiality is a serious matter*

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## References

<sup>1</sup> *Dolling-Baker -v- Merrett* [1990] 1 WLR 1205.

<sup>2</sup> *Emmott -v- Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

<sup>3</sup> *London & Leeds Estate -v- Paribas Ltd* [1995] 2 EG 134.

<sup>4</sup> *Ali Shipping Corporation -v- Shipyard Trogir* [1997] EWCA Civ 3054.

<sup>5</sup> *Hassneh Insurance Co of Israel -v- Mew* [1993] 2 Lloyd's Rep 243.

# The 'over-eager' judge

It is part of the judge's role to oversee the questioning of witnesses. Judges are rarely taciturn, and many is the expert who has been on the wrong end of an acerbic judicial comment. But how far can a judge go in this? A case came before the Court of Appeal recently in which the Court took the opportunity to make some useful observations on what is permissible.

The case concerned was *Shaw -v- Grouby*<sup>1</sup>. It involved a boundary dispute, right of access and encroachment on land in which the judge found in favour of the claimant. During the course of the trial, the trial judge had reportedly made many interjections. Indeed, according to the defendant, the judge had all but taken over cross-examination! It was alleged that he had conducted a detailed examination of the experts with a view to getting them to agree to his views, and at one point began to answer the questions that had been put to the expert by counsel in cross-examination.

## Judge usurping the advocate?

It might be argued, therefore, that the judge usurped the role of the advocate, and that the number and nature of his interjections prevented the witnesses from fairly putting their evidence. It was also suggested that this was an impediment to the evidence being fairly adjudicated upon and deprived the appellant of the opportunity to properly put his case.

The defendant appealed against the decision on the ground, amongst others, that the judge's interventions made a fair trial impossible.

The Court of Appeal noted that the trial judge had described himself as having an 'over-eager desire to get to grips with the case', but the question to decide was whether the judge had become so involved in the examination of witnesses that he had either made it impossible for the appellant's case to be conducted properly or lost the ability to reach balanced and objective conclusions on the evidence.

His interventions, it said, were excessive, and he should have attempted to postpone his questioning until after cross-examination, except where it might have been necessary to ask the witness to clarify an answer. There was no doubting that the judge's enthusiasm had continually interrupted the witness examination. However, the trial had been fair, with a proper judicial determination of the main issues.

The Court of Appeal considered an earlier decision in *Southwark LBC -v- Kofi-Adu*<sup>2</sup>. In that case, a judge hearing a landlord and tenant dispute had made constant and frequently contentious interventions during the oral evidence. Furthermore, there had been no rational basis for the judge's findings in relation to one of the parties' entitlement to housing benefit, and his whole approach to a rent arrears issue was fundamentally flawed. Therefore his conclusion on reasonableness in relation to that issue could not stand. With specific reference

to the judge's interventions, the Court said that the judge's constant and frequently contentious interventions during oral evidence served to cloud his vision and judgment to the point where he was unable to subject the oral evidence to proper scrutiny and evaluation. A retrial was ordered.

## Bullying, hostile or lacking in fairness

It seems that the crucial point here is the element of 'unfairness'. In distinguishing the decision in *Southwark*, the court in *Shaw* said that if the judge's treatment of the witnesses displayed a hostility that gave an impression of bias or a lack of objectivity, a retrial would have had to be ordered. However, although the judge had displayed understandable criticism and disapproval of the appellants' explanation in relation to a side issue, he had not approached the issues concerning determination of the boundary and the scope of the right of way in a hostile or unfair manner. The Court considered that, although the judge's questions and interventions had been frequent and excessive, he had nevertheless permitted counsel to ask all the questions they wished, and had not bullied the expert witnesses. The judge's conduct did not, therefore, make the trial unfair.

At first reading it is, perhaps, not obvious how the distinction arises. Perhaps it might be explained thus. The judge in *Southwark* had not merely erred in the nature of his interjections, but had failed in other crucial respects which made his findings unsafe. His interjections were ruled unfair not because they were too frequent or excessive, but because they were deemed bullying, hostile and lacking in fairness. Although the interjections by the judge in *Shaw* might have been unwelcome and even oppressive to the parties, they were put with courtesy and did not, it seems, stray into the area of hostility or bias. The judge, it was said, had not directly examined the witnesses on the core issues and, although his questioning was ill-advised and excessive, it did not create an impression of bias or lack of objectivity. His judgment, said the court, was unimpeachable.

However, in giving the ruling, Sir Geoffrey Vos expressed the hope that, in future: '*... judges will temper eagerness with restraint, because continuous interruptions during cross-examination can so often do more harm than good.*'

## Conclusion

Developments in the law over the previous decade or so have resulted in judges being encouraged to take a more proactive role in proceedings. Indeed, in many ways judicial intervention is seen as a virtue. However, **cross-examination of expert witnesses, or over-enthusiastic and frequent interruption thereof, should never be regarded as the function of the judge.** One hopes that the remark of Sir Geoffrey Vos will be heeded.

*Judges must temper eagerness with restraint*

## References

<sup>1</sup> *Shaw -v- Grouby* [2017] EWCA Civ 233.

<sup>2</sup> *Southwark LBC -v- Kofi-Adu* [2006] EWCA Civ 281.



# Involuntary hot-tubbing?

The advantages of concurrent examination of expert witnesses ('hot-tubbing') include:

- allowing judge-led 'discussion' of the expert issues
- letting experts ask questions of each other and take questions from advocates
- encouraging experts to give a direct view on the opposing evidence, and
- enabling experts to comment on points as they arise.

The intended outcome is that the issues that are agreed are quickly established, needless cross-examination is avoided and the evidence of all experts can often be heard in the time it would otherwise take to hear just one. It all sounds like a wonderful solution. So why is it that the system is still so sparsely used?

## Hot-tubbing has not proved popular

Well, it isn't for want of trying. In 2010, a pilot study was carried out by judges at the Manchester Mercantile and Technology and Construction Court (TCC). Participation in the scheme was voluntary and the take-up rate amongst litigants was a bit disappointing. However, judges, experts and the parties themselves were fairly unanimous in saying that they thought the procedure was helpful. Positive comments included that the examination of experts had been focused and rigorous, easier to understand and less adversarial, and it had led to considerable savings in court time. From the expert's point of view, the ability to put direct questions and give answers to opposing experts was seen as a distinct improvement.

Advocates, however, were not quite so glowing in their praise for the trials. Some barristers and solicitors expressed unease that the system had allowed the judge to 'take control of the evidence'.

And we suggest that therein lies the problem.

Experts, of course, have little or no say in the manner in which their evidence is heard. It is the seeming reluctance of lawyers to adopt the hot-tubbing procedure that has been the chief impediment to its more widespread use. This is something that has not gone unnoticed. Mr Justice Kerr recently made reference to a clinical negligence case involving oral evidence from four cancer experts. He described the case as 'a paradigm case for hot-tubbing'.

At the outset, Kerr J had raised the issue with the parties and made the suggestion that the witnesses be hot-tubbed. This proposal, it seems, was met with a very marked lack of enthusiasm. One barrister, he said, looked quite blank, as if unsure what hot-tubbing was, and the other was openly hostile. Consequently, the trial proceeded with examination and cross-examination in the conventional way. This led, said the judge, to a 'wasteful duplication of effort and cost'.

## Civil justice system looks to increase its use

Kerr J made these comments in his role of chairman of a sub-committee of the Civil

Procedure Rules Committee (CPRC), set up to consider a report last summer from the Civil Justice Council (CJC). The report found that, where it was used, hot-tubbing improved quality, saved trial time and helped judges determine disputed issues. It identified, however, that the practice was being significantly under used.

Consequently, the CJC has been looking for a way to buck this trend. In its report, the CJC has advocated, among other things, the re-drafting of Civil Procedure Rule (CPR) Practice Direction 35.11 (on concurrent expert evidence), new guidance for judges and practitioners, and a new information note for expert witnesses.

## Imposition of hot-tubbing rejected...

Kerr J's sub-committee delivered its recommendations in February, but they have been released only recently. Speaking of parties and their advocates, he described hot-tubbing as '*alien to their culture and experience of litigation*'. It was certainly not the current default position and was not widely taken up voluntarily. The sub-committee believed, therefore, that implementing the CJC's proposals might not result in significantly wider use of hot-tubbing unless it was imposed through the rules or standard directions, and the onus was on a party to opt out. The view was taken that, unless actively promoted, the use of concurrent expert evidence was likely to make little headway, at least in more general jurisdictions such as personal injury and clinical negligence. They did think, however, that the position might be somewhat different in high-end specialist jurisdictions such as patents, TCC and heavy commercial litigation.

The sub-committee's report expressed misgivings about whether the introduction of the CJC's proposals in full was desirable. In personal injury and clinical negligence cases, particularly, there was a risk of '*putting the cart before the horse if we try to promote hot-tubbing without first reviewing more widely how the current CPR part 35 and PDs work in practice and whether wider change is required*'.

## ... for now!

Reflecting on Kerr J's report, the CPRC has decided that imposing hot-tubbing on parties is '*a step too far but that certain types of cases could be identified where it should be the default position*'. It has suggested that hot-tubbing should be the default position in the Mercantile Court and the TCC. The sub-committee has now been asked to identify the types of case/issue where hot-tubbing might be appropriate, to consider how it should be raised with the parties and to determine whether it should form part of the case management process or be dealt with separately.

The use of hot-tubbing in the courts of England and Wales has had a lengthy gestation period. The day when it can be imposed on the parties might still be some distance away, but this suggestion by the CPRC may have brought that day a little closer.

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*Hot-tubbing  
improved quality  
and saved  
trial time...*

---

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*... so why is the  
system still so  
little used?*

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