Your Witness

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Beating the Legal Aid capped rate

One of the inevitable consequences of the Legal Aid Agency's (LAA) introduction of capped fees for expert witnesses back in 2013 (and one I articulated personally when visiting the Ministry of Justice) has been that high quality (and therefore busy) expert witnesses are increasingly **not** prepared to accept publicly funded work. But lawyers still need good quality experts. What next? The development of a work-around involving 'split invoicing'.

Split invoicing works like this. An expert witness is instructed to provide a report. The case is funded by the LAA. The expert witness's hourly rate exceeds the rate for that area of expertise in the LAA table (i.e. *Civil Legal Aid (Remuneration) (Amendment) Regulations 2013, Schedule 2*). The lawyer instructs the expert witness, despite the discrepancy.

When the expert witness submits the invoice, the lawyer responds saying that the case is funded by the LAA and the Agency requires all invoices to be submitted with the capped LAA hourly rates. (*By way of example, the LAA rate for a computer expert is £72 per hour. Say the expert charges £100 per hour and has submitted an invoice for £2,700. The lawyer asks the expert witness to amend it to show the LAA rate of £72 per hour and then to provide an additional 'top-up' invoice for any remaining fees. In this case that would be 27 hours @ £72 = £1,944 for the LAA invoice and a separate top-up invoice of £756.*) When the expert witness questions this approach, the lawyer says that **the LAA rates are set too low but the LAA quite simply won't agree prior authority for the higher amount**. By asking the expert witness to provide the split invoices, the lawyer is able to seek recovery of as much as possible from the LAA given the rate caps. Should the case be successful, the lawyer can then recover the top-up amount from the defendant. If the case is unsuccessful, the lawyer takes the hit.

Safeguarding the litigant

Our understanding is that **once litigants in civil cases have been granted a funding certificate, they are relieved of any further responsibility for paying the lawyers who will be representing them**. Depending on their means (which will be subject to continued assessment), they may have to make a contribution towards the costs of their case, or any property or assets preserved or recovered may be subject to a statutory charge, but that is all. To help ensure that they do not come under pressure to pay extra to their lawyers, the latter are prohibited from receiving any payment for the work they do on publicly funded cases other than from public funds, and that would include making a litigant top up payments to expert witnesses.

MoJ endorses invoice splitting

It seemed to us that this split invoicing runs foul of the LAA regulations. So we sought an authoritative view on the acceptability of invoice splitting from the Ministry of Justice (MoJ) Legal Aid Policy Unit. It took them a while, and it was clear there was some jockeying for position in the Ministry about which view to take. In the end, pragmatism seems to have won out and James MacMillan told us that:

> *'Having considered the issue with colleagues here, the MoJ takes the view that the practice of split invoicing you describe does not contravene legal aid regulations, provided the assisted person is not being asked to pay anything.'*

Ministry of Justice

So, if you are asked to undertake publicly funded work but won't work for the parlous fee rates on offer from the LAA, if your instructing solicitor is willing, *and if you accept this assurance from Mr MacMillan as sufficient authority,* you can adopt this type of split invoicing and beat the cap!

But will this help justify low LAA rates?

As an aside, there is a concern that if solicitors are able to present split invoices to the LAA at the capped rate, the LAA/MoJ will likely use this as evidence that the cap rates are reasonable because experts are working for the capped rates, when in fact they are not. It would be much better if this splitting could be done in a transparent way so that the LAA knows its rates are too low!

It's unlikely to be seen in criminal cases

Incidentally, we think the effect of Para 9 (b) of *Criminal Legal Aid (Remuneration) Regulations 2013* means that this approach to invoicing has always been perfectly acceptable in the criminal arena. However, perhaps law firms majoring on criminal work will be much less likely to wish to pay the top-up sum from their own pockets because there is no option for them to seek recovery from the other side!

Member services

If you look at the back page of this copy of *Your Witness* you will see a summary of the many benefits that come with membership of the *UK Register of Expert Witnesses*. By pointing your browser at *https://www.jspubs.com/benefits*, you can find out more. I encourage you to do so and take full advantage of your membership.
Chris Pamplin

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Redacted expert reports

Judge must decide on redaction or excision, if anything

It sometimes happens that an expert report is produced that contains inadmissible material. This creates something of a dilemma. Clearly, it would not be helpful to proceedings if the whole report was disallowed, but what provision can be made for it to be redacted or excised?

The leading case on this matter is *Rogers -v- Hoyle*[1]. The claimants were the executors of a man who died when an aircraft piloted by the defendant crashed. The claimant sought to adduce evidence in the form of an expert's report that had been produced by the Air Accident Investigation Branch (AAIB) of the Department for Transport. The report contained statements of fact, as well as opinion evidence.

The Secretary of State intervened in the action and both he and the Air Transport Association submitted that there should be a presumption against admitting AAIB reports because admissibility would inhibit investigators from carrying out their role and discourage witnesses from assisting investigators.

However, the court held that the report was admissible. It was of particular potential value on account of the AAIB's independence, the fact that it was the product of an investigation by experts who were not concerned to attribute blame, and the fact that the AAIB had greater ability than anyone else to obtain and analyse relevant data. The exercise of discretion was to be carried out in accordance with the overriding objective, which tended to favour the inclusion of evidence such as the report. Turning to the question of the factual evidence contained in the report, the court was asked to make an order that opinion on facts that required no expertise to evaluate should be excised from the report.

Trial judge can see the full report

The court held that the trial judge should see the whole report and leave out of account any part of it that was inadmissible. Furthermore, the defendant's submission – that the Civil Evidence Act 1968 and Civil Procedure Rules (CPR) Part 35 comprised a comprehensive code regarding expert evidence which excluded evidence such as the report – was not well founded. Section 3 of the Act did not purport to be all-embracing or to alter the position at common law. CPR Part 35 was concerned with persons who had been instructed to give expert evidence for the purpose of proceedings; the expert evidence in the AAIB report did not fall within Part 35. Accordingly, the report was *prima facie* admissible and the claimants did not need the court's permission to adduce it. The report was admissible evidence.

The decision in *Rogers* has been followed in subsequent cases. Briefly stated, the principle to be derived boils down to this: **Except in very clear cases, it is unnecessary and disproportionate to exclude opinions where the expert's report opined on inadmissible matters. The whole document should be put before the court. It is then for the trial judge to take account of the report only to the extent that it reflects expertise and to ignore any parts that do not.**

To excise or not?

Earlier this year the question of excision of expert reports came before the court once again. In *A -v- B*[2], the defendant made an application seeking an order that certain parts of an expert report be ruled inadmissible or prejudicial. The court was required to consider whether the offending parts of the report should be excised. Both parties instructed experts; in addition, there was a jointly appointed expert. Preliminary issues then arose.

The defendant submitted that parts of the claimant's expert's report addressing questions such as the application of foreign law to the facts were inadmissible or prejudicial. The defendant also sought to argue that *Rogers* was distinguishable because it had been a decision made in relation to an expert's report that did not fall within the ambit of Part 35.

Moulder J said that she could see no reason why *Rogers* should be limited to expert reports falling outside CPR35. She acknowledged that *Rogers* appeared to leave open the possibility of excising inadmissible evidence in a 'clear case'. The court had to balance whether that was the correct approach, even in those sections of a report claimed to be clearly inadmissible. In the present case, she did not believe that the defendant had succeeded in establishing that there would be any real prejudice if the whole report was put before the trial judge.

Costs of excision a factor

The judge considered the expense of excision and the trouble to which the parties would be put by such an order. In addition to the parties' own expert reports, there was also a jointly prepared report. In the joint report, one expert had responded to opinions expressed in an individual report by another expert. She did not consider it a reasonable exercise to pick through and excise individual sentences and engage in an editing exercise of all three reports. She was satisfied that the more appropriate course was to permit the joint report to stand in its entirety and to allow the court at the forthcoming hearing to consider it along with all the expert reports. The defendant's various submissions on issues of admissibility could then be raised at the hearing and the judge could simply ignore anything found to be inadmissible. Moulder J considered that it was both unnecessary and undesirable for that decision to be pre-empted by a consideration at the instant hearing of the relevance or admissibility of that expert's evidence.

The judge's ruling in this case is of some significance because it reasserts the principle in *Rogers* and establishes that it is applicable to all expert reports. It does, however, leave open to question exactly what will constitute the 'clear case' envisaged in *Rogers* where the excising of inadmissible evidence would be permitted.

References

[1] *Rogers -v- Hoyle* [2014] *EWCA Civ* 257.

[2] *A -v- B* [2019] *EWHC* 275 (*Comm*).

MoJ digitisation difficulties

The claim of 'modernisation' seems so often to be merely a byword for 'decline' forced on us by bean counters seeking to cut costs. It usually means moving basic tasks to automated systems, dealing with common scenarios using algorithms and, where human-to-human interaction is necessary, restricting it to dealings with largely unskilled and low-paid staff who will handle only those matters that can be processed using a tick-list. Anyone who has dealt with a call centre for one of the major utility companies will have had experience of what 'modernisation' can do to customer service!

CPP will cut costs... allegedly!

In these days of continuing austerity, where the Ministry of Justice (MoJ) is as strapped for cash as everyone else, our legal institutions have not been immune to the drive towards greater automisation. The MoJ's reform programme, launched in 2016, includes the introduction of a new computer system – The Common Platform Programme (CPP) – which allows information to be shared between the courts, the police and the Crown Prosecution Service.

The programme also includes a digital overhaul of HM Courts & Tribunals Service (HMCTS), intended to encompass the digitisation of paper records, centralising customer services and introducing virtual hearings. The programme has been allocated a budget of £1.2 billion. Although a considerable sum, the MoJ believes that it will lead ultimately to greater savings because it will enable staff cuts of 5,000 and reduce the number of cases held in physical courtrooms by 2.4 million per year by 2023.

The Public Accounts Committee has called the digitising of paper records and the introduction of virtual hearings a 'hugely ambitious' project that is being implemented 'on a scale which has never been attempted before anywhere'.

The CPP was projected to be completed in July 2018. However, last year it was decided to delay completion until June 2020 to stay within budget.

IT problems disrupt virtual courts

We have reported previously on fears that had been expressed concerning the MoJ's plans for 'virtual courts'. Certainly, the programme did not get off to a good start. The very first case in the Tax Tribunal had to be adjourned when a three-way internet link broke.

And there have been further problems. Earlier this year, severe disruption was caused when there was a major IT failure, causing computer and phone lines to go down. Lawyers and judges were unable to work, and many cases were adjourned. Justice minister Lucy Frazer told the House of Commons that it was the result of 'infrastructure failure in our suppliers' data centre.'

The MoJ was initially unable to say what had caused the failure, but it was quick to assure the Public that it was not the result of a cyber attack and no personal information had been lost. Some reports suggested that the breakdown had caused some people to have been wrongfully imprisoned and others to have been wrongly freed. These reports were denied.

In a separate incident, there were problems with the secure criminal justice email system.

IT problems besiege court modernisation

Court system too vulnerable to technology

Speaking to *The Independent*, Richard Atkins QC, Chairman of the Bar Council Member Services Board, highlighted how vulnerable the courts system is becoming to technological problems.

> *'Whilst HMCTS is moving forward with its programme of online justice, these problems would suggest that more investment in the basics is needed first. We cannot have a justice system that comes to a shuddering halt the moment the IT does not work properly'.*

The continuing fears over the use of unreliable new technology by the MoJ has led the National Audit Office to add its voice to the growing number of concerned parties.

The Criminal Bar Association, too, has been vociferous in its criticism. Commenting on the recent outage, the Association's Chairman, Chris Henley QC, suggested that the whole programme threatened to bring the criminal justice system to its knees:

> *'Prolonged IT failures do a disservice to the victims of crime and their families who may have already suffered the costs of delays from an already over-stretched, chronically underfunded, broken criminal justice system.'*

No vision, no measurable

Stoking fears that HMCTS will not be able to achieve all it wants within the time available, Meg Hillier MP, Chair of the Public Accounts Committee (PAC), said that there needed to be greater clarity about which of the promised benefits it will actually be able to deliver. She said that pressure to deliver quickly, and the need to make savings, mean that the HMCTS risks driving through changes without fully understanding the impact on users and the justice system more widely. The parliamentary committee has concluded that it has 'little confidence' in the transformation in light of HMCTS not having shared a clear vision and falling behind its timetable. In another scathing criticism, Ms Hillier said that the Government had cut corners in its rush to push through the reforms. She called the timetable unrealistic, the consultation inadequate and said there had been no clear explanation by HMCTS about what the proposed changes would actually mean in practice.

It is difficult to see how these reforms can ever be called a success if the result is to undermine people's access to justice and to pile further pressure on the police and other critical public services. Experts, like other court users, will monitor progress with interest, and also, we suspect, with some trepidation.

Omens for the MoJ's plans are not promising!

Failure to comply with CPR35 – chang

From the outset of Lord Woolf's reform of the civil courts and the creation of the Civil Procedure Rules (CPR), emphasis has been placed on the serious consequences of failure to comply with the rules. So far as the provision of expert evidence is concerned, the key rules are contained in CPR Part 35.

Courts have grown increasingly intolerant of delay

Intolerance of breach and delay has grown

Jackson LJ's review of civil litigation costs in April 2013 introduced a new culture to the courts. All court users have found the courts much less tolerant of delay, of any failure to observe the rules and of any breaches of court orders, directions and time limits. The result has been more sanctions imposed.

Sanctions for rule breaches can be levied automatically by the particular rule or may be prescribed by the court in an order. An example of an automatic sanction is r32.10:

> *'If a witness statement or witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.'*

In relation to expert evidence, r35.13 states:

> *'A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission'.*

A sanction imposed by a rule or court order will, therefore, have effect unless a party makes an application to the court for relief from the sanction under r3.8(1), and relief is granted.

The procedure and test for relief is set out in the revised r3.9 which provides:

> *(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –*
>
> *(a) for litigation to be conducted efficiently and at proportionate cost; and*
> *(b) to enforce compliance with rules, practice directions and orders.*
>
> *(2) An application for relief must be supported by evidence.*

Extreme consequences of a minor breach alarming

In recent years the courts have become so costs conscious that the r3.9 procedure has been followed, even in circumstances when the breached rule contains no specific sanction.

The Rules of the Supreme Court (the 'White Book') have always contained the suggestion that **if a witness statement is served late, it would be unjust to exclude the evidence from trial save in very rare circumstances**. However, the courts have hardened their approach to breaches of this and other rules in successive cases.

In *Mitchell -v- News Group Newspapers Ltd*[1], relief from sanction was not given to a party that had failed to file a costs budget on time (it was submitted 7 days late). The court held that explicit references in the revised version of r3.9 – namely the need for (a) litigation to be conducted efficiently and at proportionate cost, and (b) enforcing compliance with court rules, orders, and practice directions – were to be regarded as paramount. Although the provision required the court to consider 'all the circumstances of the case', those circumstances were, the court believed, generally to carry less weight than (a) and (b) above. However, since r3.9 appears to give no greater significance to (a) and (b) over 'the circumstances of the case', it is, perhaps, difficult to follow the court's reasoning. Here, there was a distinct shift away from focusing exclusively on doing justice in the individual case.

When a court considers a party's non-compliance to be trivial, relief from sanction is normally granted if an application is made promptly. However, if the default is not trivial, the burden of persuading the court to grant relief lies with the defaulting party. The approach taken by the courts has been that **missing a deadline will not normally result in relief from sanction unless supported by strong and compelling evidence that there are good reasons** for the missed deadline.

In *Mitchell*, the court held, on an application for relief from sanction, that the starting point would be that the sanction had been properly imposed. There could be no complaint that the sanction did not comply with the overriding objective or was otherwise unfair; **the words 'unless the court otherwise orders' are intended to ensure that the sanction imposed gives effect to the overriding objective**.

The thinking of the court was that, although it may seem harsh, once the court's attitude is understood, it will encourage parties to conduct litigation in a more disciplined and cost-effective manner. A more robust approach will mean that relief from sanctions is granted more sparingly.

Breaches involving expert evidence

The difficulty with witness evidence (including expert evidence) is that if a party is prevented from adducing such evidence, or is unable to examine or cross-examine the witness, this can effectively bring proceedings to a halt. In this manner both parties are denied access to justice. At the very least, it will severely limit the information available to the court and make the basis for any decision potentially unsound. Hence the guidance in the White Book, which the decision in *Mitchell* effectively weakened.

In *Chartwell Estate Agents -v- Fergies Properties*[2], the trial judge granted both parties relief from sanction following their failure to serve witness statements on time. He considered that where a witness statement was not served on time, the witness could not be called to give oral evidence unless the court gave permission. Since the Rules had determined the applicable sanction, there

could be no argument that the sanction was unjust or disproportionate. The question was therefore whether the sanction should not be applied in the particular case.

CPR r3.9 required him to consider all the circumstances of the case, including that the trial date would not be lost and no significant extra cost would be occasioned if relief was granted. He was also entitled to attribute importance to the fact that a refusal of relief would effectively mean the end of the action because the burden of proof was on the claimant, who would have no evidence. Arguably, that was simply a consequence of the sanction. However, r32.10 does not provide that failure to serve a witness statement will result in striking out. But it would be unreasonable to disregard such a *de facto* consequence of a refusal to grant relief.

Since both parties had been at fault, and in considering the circumstances of the case, the judge granted relief. The judge was also uncomfortable with the fact that, although both parties had been at fault and had appeared to set their own timetable, there was an advantage to the defendant if relief from sanction was not granted.

The defendant's appeal against the decision was dismissed by the Court of Appeal. It said that one sure way to avoid satellite litigation over relief from sanctions is for parties to comply precisely with the rules and orders. Where that is not possible, parties should seek from the court extensions of time and relief from sanction at the earliest opportunity. The Court of Appeal's reluctance to interfere with case management decisions applies not only to decisions where relief from sanction has been refused, but also to 'robust and fair decisions' where relief has been granted.

That, then, is the position. Most court users have got the message that failure to comply with the CPR will have dire consequences and defaulting parties are unlikely to get much sympathy.

Signs of a gentler approach?

Experts should be well aware of their duties and specific responsibilities in complying with Part 35. **A failure to serve expert reports in time or any other departure from the rules will not be looked upon kindly**.

The recent decision of the court in *R (on the application of Holownia) -v- Secretary of State for the Home Department*[3] may, therefore, come as a bit of a surprise. In an action for judicial review against the defendant Secretary of State, a claim was made for unlawful detention and consequent alleged psychiatric injury. Despite having obtained an expert report in support of his claim many months beforehand, the claimant had not disclosed it. Indeed, from the outset, the claimant had failed to take any steps to comply with Part 35.

In December 2018, shortly before the review hearing, the claimant served his expert report supporting the assertion that he had suffered psychiatric injury from the alleged unlawful detention. His failure to comply with Part 35 did, of course, render the expert evidence inadmissible. So you might think the matter ended there.

Simler J appears to have attached greater significance to fairness than hitherto. He recognised that it would not be fair to the claimant if he was prevented from relying on his expert evidence. But the judge also understood that the defendant should not be prejudiced by the evidence being allowed.

If the claimant had complied with Part 35 in the first place the defendant would, he said, have had the opportunity to consider if it wanted its own expert witness and to limit the report to what it deemed to be the contentious issues. There were also factual matters in the report on which the defendant should have been able to adduce evidence.

Simler J decided that the best course of action would be to adjourn the question of whether and to what extent the claimant had suffered psychiatric injury. That issue could be heard in the county court at a later date and, if necessary, oral evidence adduced by both parties. So the claimant was allowed to rely on his expert report and the Secretary of State was also allowed to adduce expert evidence in response.

On the face of it, this was a curious decision. The emphasis that *Mitchell* placed on efficiency, proportionate cost and enforcing compliance with court rules does not appear to have been the overriding factor in this judge's decision. Instead, he seems to have reverted to the more lenient approach advocated originally by the White Book and the need to 'deal justly with the application' as set out in r3.9(1).

Of course, the circumstances of each case are different, and it is unlikely that this one case signals any general relaxation in the attitude of the courts. It is probably true to say, however, that with the marked increase in the number of litigants in person (who are unfamiliar with court rules), the approach taken in *Mitchell* and other cases is one that will not sit easily with the requirements of fairness and justice.

Where litigants in person have obtained an expert report, the only person in the case likely to be sufficiently familiar with court rules and procedure is the expert. But the prospect of an expert advising a party on how to proceed is not appealing. Little wonder, then, that many experts decline instructions from litigants in person.

Conclusion

The strict approach taken in *Mitchell* is, perhaps, a luxury the justice system can no longer allow itself, not least because of the rapid growth in the number of litigants in person. Hopefully the more fair-minded attitude taken by Simler J will pave the way to a more measured stance in relief from sanctions.

Possible signs of a more fair-minded attitude

References

[1] *Mitchell -v- News Group Newspapers Ltd* [2013] *EWCA Civ* 1537.

[2] *Chartwell Estate Agents Ltd -v- Fergies Properties SA* [2014] *EWCA Civ* 506.

[3] *R (on the application of Holownia) -v- Secretary of State for the Home Department* [2019] 2 *WLUK* 405.

Mentor schemes must be disclosed

Experts must disclose any mentor or QA process used

The duties of an expert witness, as laid down in *The Ikarian Reefer*, are well established and all expert witnesses should be familiar with them. Uppermost amongst these is that **the expert owes an overriding duty to the court, before any obligation to the person from whom they had received instructions or payment, or to any commissioning organisation**. Protocols dictate that experts must be independent, and their views should be given without outside influence and should be free of witness 'coaching'.

In *Pinkus -v- Direct Line*[1], we have a recent example of a case in which an expert failed in this duty. As a result, the court gave a useful ruling on what is required.

The case involved two neuropsychologist expert witnesses. The claimant's expert considered that the claimant's symptoms had been triggered by the accident that started the claim. However, the defendant's expert disagreed and criticised the extent of the testing carried out by the claimant's expert.

A joint statement was discussed between the experts. During the course of these exchanges, the defendant's expert received an email from the claimant's expert sent in error. The defendant's expert claimed that this email demonstrated that the claimant's expert was seeking opinion and advice from a colleague. So the defendant applied to the court for disclosure of the email correspondence between the claimant's expert and her colleague.

The claimant argued his expert had not done anything wrong and that it was not unusual for experts to seek 'collegiate advice' or peer review as part of a mentor programme. It was further argued that, in any event, the emails were privileged as part of expert joint discussions. The claimant conceded that normally communications between an expert and a third party in relation to matters within an expert report do not attract privilege. However, he argued that, in this case, because a joint discussion was ongoing, the emails were covered by privilege.

Dealing with the issue of privilege, Judge Cotter QC said the claimant's assertion was wrong. This was not, he said, a continuing discussion between the experts, but a discussion between one expert and a third party. It was not enough that reference to what had been discussed between the experts was set out in the emails. The judge was satisfied that a finding that the emails were not privileged would neither offend nor undermine the public policy of permitting the two experts in the case to have a free discussion. However, the nature of the peer supervision should have been disclosed within the expert's report. The failure to do so was not a minor error and was at the root of the difficulties.

Civil Procedure Rules Practice Direction 35 (PD35) says that **expert evidence should be the independent product of the expert, uninfluenced by litigation pressures**. The word 'independent', said the judge, was important. Independence required that the expert's views should be provided without outside influence or, more particularly, any *undisclosed* outside influence.

Experts should provide 'objective, unbiased opinion on matters within their expertise', with the emphasis on *their*. It was important that the courts and any other expert or party knew the limits of that expertise.

PD35 para 3.2(5) requires that an expert should set out, in relation to any examination, measurement test or experiment used, the qualifications of any person who has undertaken it and whether it was performed under the expert's supervision. In this case, **the discussion by the expert with her colleague, even if carried out under some peer review arrangement, was in grave danger of breaching the rules unless it was disclosed in the report**. The circumstances in which such a discussion could properly remain undisclosed were extremely limited. The argument that it was no more than relying upon collegiate advice was not accepted.

The judge added that, under PD9.8, if an expert alters an opinion, they should include a note or addendum explaining why they have changed that opinion. In his view, that would include an additional note as to whether or not the change comes as a result of information provided by another expert.

The judge identified that there was a key issue regarding the extent to which the claimant's expert had understood the defendant's expert's view, and the extent to which she had then sought assistance from her colleague on the issues raised. The judge considered it very important that the court and the other party should know that the expert's evidence had not been bolstered or added to by a third party. Furthermore, an expert being challenged is entitled to know who else he or she is effectively discussing the case with and the full expertise and knowledge of any 'secondary' experts.

Accordingly, disclosure of the emails was ordered, and cross-examination allowed in relation to them.

Transparency, as always, is the key

In setting out the expert's duties, Judge Cotter was at pains to highlight that the **expert's overriding duty will prevail over any obligation to the person from whom they have received instructions or by whom they are paid**. To this, he specifically added any organisation under whose auspices the report has been commissioned. Accordingly, experts should bear in mind that **any assistance or mentoring received concerning the substance and format of the report would likely fall foul of this decision, if undisclosed**. If any such arrangement exists, experts need to be extremely cautious if they think they can hide the fact and the extent of that arrangement.

References

[1] *David Pinkus -v- Direct Line Group* 2018 *WL* 00660352.

Expert evidence on foreign law

If Brexit actually happens, we should, perhaps, expect to see some increase in commercial litigation, and the applicable laws of more far-flung nation states.

It has long been an established principle of English law that, in general, evidence of foreign law is adduced by expert evidence. Indeed, the court is not entitled to construe foreign provisions for itself.

Contrary to what one might think, the expert witness does not have to be a practitioner in the law of the foreign jurisdiction, or even a lawyer. Evans LJ in *Macmillan -v- Bishopsgate Investment Trust*[1] gave a useful guide to the function of expert evidence in this field. It was, he said:

> *'(1) to inform the court of the relevant contents of the foreign law, identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction*
>
> *(2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and*
>
> *(3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.'*

On the face of it, then, there does seem to be some cross-over with evidence of fact (which is not normally within the remit of expert evidence) and some scope for expert opinion on the ultimate issue (which in normal cases would be ruled inadmissible).

An oddly broad remit for an expert

For example, in *G & H Montage -v- Irvani*[2] an expert was called to give evidence in a case that hinged on a novel point of German law. There was no precedent and no obvious answer to be gleaned. The expert gave a prediction about how a German court would react, given a similar set of circumstances. The trial judge accepted the expert's opinion and the decision was upheld by the Court of Appeal.

Of course, if the predicted decision of the foreign court goes to the ultimate issue, then this would give the expert far greater power to influence the final decision than would normally be the case. However, while experts may give an opinion on the scope, meaning and effect of foreign law, and may make a prediction about how any contentious issue might be resolved at the highest appellate level of that foreign jurisdiction, it is not the function of an expert witness to put forward an opinion on the application of the foreign law to the specific facts of the case before the court. Why not? Because it is the function of the court to determine the ultimate issue. This, though, is a very fine distinction. Indeed in many cases, it would be difficult to separate one from the other.

An area where the distinction seems particularly tenuous concerns that of expert opinion on the effect of the foreign law on a particular document. Such opinion is permissible, even if the construction of the document is an issue central to the case and one upon which the final outcome will hinge.

The opinion may only be given in the absence of direct authority, such as that which may be contained in foreign legislation. However, in that case the expert would, of course, be offering factual evidence.

Evans LJ was conscious of this when listing his three functions of the role of the expert. He said:

> *'the first and second of these require the exercise of judgment in deciding what the issues are and what statutes or precedents are relevant to them, but it is only the third which gives much scope in practice for opinion evidence, which is the basic role of the expert witness.'*

In so far as the expert is giving evidence of fact, the judge must evaluate it in the same way as the evidence of any other witness of fact.

The special nature of expert evidence on foreign law means that the role of the judge, too, will differ slightly from the usual role of assessing both ordinary evidence of fact and other types of expert evidence. Being a lawyer, the judge will, no doubt, bring a legal mind to bear on the question of foreign law and the principles to be decided. This is more likely where the codex of foreign law is similar to our own; where it is not, the judge will have to evaluate the evidence like any other evidence of fact.

If the expert is deemed credible and reliable, and in the absence of disagreement between experts, the court should base its findings on the evidence given by the experts and should be reluctant to reject it.

The English court may not conduct its own researches into foreign law, but if there is conflicting evidence given by two or more expert witnesses, the court is entitled, and indeed bound, to consider the foreign sources to decide between the conflicting testimonies. In circumstances where there are no relevant foreign authorities, and there is disagreement between the expert witnesses, the trial judge is entitled to form his or her own independent view. The Court of Appeal is also entitled to form a view independently of the view of the trial judge. As seen in *Macmillan*, it is more likely to do this when the foreign law is similar to English law.

Conclusion

Traditionally, the Court of Appeal will be reluctant to interfere with decisions involving findings of fact by judges of lower courts. But, in the case of findings of fact based on expert evidence of foreign laws, there is a greater readiness by the appeal court to do so. It probably applies equally to other limited circumstances when expert witnesses may be permitted to give factual evidence as part of their expert evidence.

Expertise in foreign law may become a growth area after Brexit

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