

Your Witness

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Another one bites the dust

On 7 June 2007 the latest in a long line of medical reporting organisations (MROs) went into administration leaving doctors to carry, as we will see, millions of pounds of losses.

IMS, of Richmond in Surrey, was incorporated in 1996. Its business grew quickly, and by 2000 its customer profile warranted the formation of a new company (IMS Legal Indemnity Ltd) to deal exclusively with one major customer. By 2005, IMS had a turnover of £8.2 million and its principal source of funding was an Icelandic bank.

It was now that the wheels started to come off the wagon. The major customer began to put work elsewhere and the creditors started to sue in the county court. IMS had to meet £1.3 million of litigation costs and lost £0.25 million in an aborted stock market flotation.

As IMS entered administration it owed £6.8 million to the Icelandic bank. Despite the books showing £8.9 million, the administrators believe that the ledger is unlikely to realise sufficient funds to repay the bank. Clearly, then, there will be no surplus available to meet the claims of secured and preferential creditors, let alone the hundreds of unsecured creditors (a.k.a. doctors) owed an estimated £4,008,306.

Sadly we have been here before, which is why I devote a whole chapter to MROs in our *Little Book on Expert Witness Fees*. The safest option is for doctors to refuse to work through MROs.

Solicitors use agencies because they offer generous credit terms – obviously attractive to a solicitor running a case with no funding. But, as the *Little Book* points out, doctors are better advised to deal direct with solicitors because it has some important advantages.

However, since this is an option that thousands of doctors are not exercising exclusively, the distinctly second-rate alternative is to keep the amount of money owed by any MRO in line with an assessment of their financial stability. For some, it may mean demanding payment before releasing the report to the MRO.

Inside

Another medic before the GMC

Following on from the Meadow case, the GMC is faced with another medic who stands accused of peddling ‘junk science’. Jane Donegan, a GP and homeopath, gave evidence supporting the claims of two mothers who were seeking to prevent their former partners from enforcing childhood immunisation of their children, aged 10 and 4 years. The trial judge rejected the claims of the mothers – that vaccination was unnecessary and possibly dangerous – and their appeal against this was dismissed in 2003.

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Dr Donegan is opposed to immunisation in general, and in the course of the proceedings submitted two written reports and gave oral evidence. Criticising her evidence, Lord Justice Sedley did not mince his words. He said that the court had been presented with junk science. Her report, he said, contained ‘no independent research, and most of the published papers cited by her in support of her views turned out either to support the contrary position or at least to give no support to her own’. The trial judge, Mr Justice Sumner, had also been highly critical of her evidence and had said that he was ‘compelled to the reluctant conclusion that in this case Dr Donegan has allowed her deeply held feelings on the subject of immunisation to overrule the duty she owes to the court.’

Dr Donegan denies that she was in breach of her duty. On her web site she acknowledges that she was criticised for not specifically stating that most of the authors of the papers from which she quoted recommended vaccination, or even repeated courses of vaccination. This, she says, was unintentional. She suggests that the trial judge was less impressed with her qualifications than those of the eminent experts whose reports supported the opposing view. She says that ‘the judge said that he was very impressed by the numerous committees of which Dr Conway and Professor Kroll were members’, but that ‘it is unsurprising that people who support the establishment view are on prestigious establishment committees... Goering and Himmler were undoubtedly on many authoritative and prestigious committees in Nazi Germany, but most people would not regard this as qualifying them to give an impartial opinion on the pros and cons of Hitler’s “Final Solution”’. She suggests that counsel for the fathers gave a highly skilled performance and did an admirable job in finding ambiguities or inconsistencies in her statements and then implying that they had been placed there with intent to deceive. According to Dr Donegan, ‘it was not so much a case of “junk science” as “junk justice.”’

Dr Donegan’s case (which was undoubtedly delayed pending the appeals in the Roy Meadow case) came before the GMC’s Fitness To Practice Panel on 7 August and the hearing is expected to last for 2 weeks. She is accused of bringing the profession into disrepute by failing to present a balanced report to the court, namely one that is objective, independent and unbiased.

The hearing continues as we go to press.

Chris Pamplin

Expert witness survey 2007

Experts can still contribute to this survey

There was a good response to the questionnaire enclosed with the June issue of *Your Witness*. Just over 400 forms were returned, or submitted on-line at www.jspubs.com, accounting for some 16% of the readership. I extend my thanks to all who took the trouble to complete them. Their data have contributed to the seventh survey of its kind in 12 years. However, this represents a small downturn in the number of experts contributing to the survey. But it isn't too late to take part! If you go to www.jspubs.com before the end of September and follow the link to *Survey 2007* you can still complete the survey and we will add your input into our final analysis.

The experts

Of the 414 experts who returned questionnaires by mid-August, 181 were medical practitioners. Of the remaining 233 experts, 52 were engineers, 21 were in professions ancillary to medicine, 21 were accountants or bankers, 19 had scientific, veterinary or agricultural qualifications, 18 were surveyors or valuers and 17 were architects or building experts. The substantial 'others' category totalled 85, of whom 12 were psychologists.

Work status and workload

Of the respondents, 211 (51% of the total) work full time and 165 (40%) work part time. Only 7% describe themselves as retired. These figures reveal a shift of some 5% towards part-time work from full-time work over the last 2 years, taking the figures back to their 2003 levels.

Overall, expert witness work accounts, on average, for just 43% of their workload, a figure essentially unchanged since 2001. Clearly, these individuals are much involved in expert witness work but have an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience and outlook

We also asked respondents to say for how long they had been doing expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 92.5% had been practising as expert witnesses for at least 5 years, and 76.6% had been undertaking this sort of work for more than 10 years. Most of the respondents (57%) saw expert witness work as an expanding part of their workload, similar to the view expressed in 2003 and 2005.

Their work

Reports

In all seven of our surveys we have asked those taking part to estimate the number of expert

	1999	2001	2003	2005	2007
Full reports	48	41	45	54	54
Advisory reports	19	12	11	13	17

Table 1. Average number of full and advisory reports per expert over time.

reports they have written during the preceding 12 months. The averages for the last five surveys are given in Table 1.

These data reveal a dip in output in 2001, following the introduction of the Woolf reforms and the Civil Procedure Rules. This downturn now appears to have been fully reversed. This recovery has also been seen in civil court business. Following the introduction of the Woolf reforms there was a 7% fall in county court claims between 2001 and 2004. But by the end of 2005 the number of civil claims in England and Wales had increased to 1,870,374, 8% higher than in 2001¹. The volume of cases in the much smaller criminal sector has remained essentially unchanged since 2001.

Single joint experts

Statistics relating to the use of single joint experts (SJE) have remained unchanged since 2003. Now, as then, 73% of experts had been instructed as SJE, and on average each expert had received 14 such instructions in the year.

Court appearances

Another change over the years that many experts will find more welcome is the reduction in the number of cases for which they are required to give their evidence in court. It is now altogether exceptional for experts to have to appear in court in 'fast track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 we recorded that the average frequency of court appearances was 5 times a year; some 4 years later this had dropped to 3.8; it now stands at 3.1.

Variation by specialism

These averages, however, hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms,

Professional group (n = number of respondents)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (n = 181)	81.9	3.0	15.8	23.1
Paramedicine (n = 21)	29.4	2.7	7.1	10.7
Engineering (n = 52)	20.4	2.5	17.1	6.5
Accountancy (n = 21)	11.3	1.9	10.3	2.9
Science (n = 19)	39.5	6.1	19.7	2.0
Surveying (n = 18)	8.6	1.2	9.5	3.7
Building (n = 17)	14.9	0.9	15.3	4.4
Others (n = 85)	39.2	4.2	8.8	10.9
<i>Aggregate averages</i>	<i>51.3</i>	<i>3.1</i>	<i>13.7</i>	<i>14.3</i>

Table 2. Average number of reports, court appearances, advisory reports and SJE instructions by specialism.

Volume of work has recovered to pre-Woolf levels

where the average drops to around five SJE instructions per year.

Numbers of court appearances are similar in all areas except the sciences. This may reflect the use of forensic science in the criminal caseload.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? This information is summarised in Table 3.

For each professional group the table gives average hourly rates for writing reports and full-day rates for attendance in court, with the 2005 data for ease of comparison.

Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures. It is apparent, though, that on average the rates for report writing have increased by little more than the prevailing rate of inflation over the 2 years.

Cancellation fees

The issue of fees that become due as a result of cancelled trials continues to be a source of friction between expert witnesses and those who instruct them. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, the percentages are 8.0% if notice is given at least 28 days before the trial was due, 20.0% if 14 days, 42.9% if 7 days and 70.0% if just 1 day's notice is given.

The right to cancellation fees is one that has to arise from the contract between the expert and the lawyer. This ought to act as yet another spur to experts to put in place clear, written terms of engagement. But as we are about to see, there has been little improvement in this aspect of expert witness practice!

Speed of payment

In this survey, 80% of experts reported that the promptness with which invoices are paid had not deteriorated – but that really means matters couldn't get much worse! One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills were being paid on time *in even half of their cases* is only 48% (up from 39% in 2003 but unchanged since 2005). Clearly, the situation remains pretty grim.

Against this background, it is depressing to note that whilst 85% of experts say they stipulate terms, still fewer than 50% use a written form of contract. Without a solid contractual basis, experts are making their credit control much more complex than it need be. The *Civil Procedure Rules Experts Protocol* requires (at 7.2) that terms be agreed at the outset. Clearly, the hope we expressed in our report on the 2005 survey (see *Your Witness* 41) – that the imposition of this

Professional group (n = number of respondents)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2007	2005	2007	2005
Medicine (n = 181)	170	171	1,163	1,068
Paramedicine (n = 21)	118	104	827	785
Engineering (n = 52)	112	96	876	674
Accountancy (n = 21)	174	161	1,105	1,177
Science (n = 19)	107	89	720	664
Surveying (n = 18)	142	122	938	880
Building (n = 17)	102	97	835	732
Others (n = 85)	121	97	811	767
<i>Totals</i>	<i>143</i>	<i>135</i>	<i>991</i>	<i>914</i>

Table 3. Average charging rates for report writing and court appearances by specialism.

official obligation would help to persuade more experts to adopt written terms – was ill-founded!

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. As an expert listed in the *UK Register of Expert Witnesses* you have access to *Factsheet 15* dealing specifically with terms of engagement (all factsheets are freely available at www.jspubs.com), but with the launch of the *Little Book on Expert Witness Fees*² we have made creating a set of terms even easier.

The *Terminator* section of the *Register* web site enables registered experts to create personalised sets of terms of engagement based on the framework set out in the *Little Book on Expert Witness Fees*². So now there is even less of a reason why any expert should take on instructions without setting down a firm contractual base and in the process better secure their own position.

The ultimate solution?

If all else fails, experts can sue for their fees – or at least threaten as much. Obviously, this should be the option of last resort, if only because it is likely to lose the expert a client. But experts are increasingly finding it necessary to take such action.

Of those who took part in our 1999 survey, 24% claimed to have sued for their fees on at least one occasion. That figure has risen to 34% in this survey. If you are considering suing for your fees, the *Little Book on Expert Witness Fees*² has a whole chapter dedicated to getting paid. But it is important to recognise that the basis for any such suit is in contract. If you haven't built the instruction upon a firm contractual footing, winning in court may be more tricky.

Chris Pamplin

Hourly rates grow at just above the rate of inflation

Reference

¹ *Judicial Statistics 2005 (revised)*, Cm 6903, HMSO. ISBN 0-10-169032-0

² Pamplin, C.F. [2007] *Expert Witness Fees*. JS Publications ISBN 1-905926-01-4

Limiting the evidence

To what extent can experts control the scope of evidence in a case?

Limiting the amount and scope of expert evidence has long been one of the functions of the case management procedures of the civil courts. The time and expense involved in the provision of expert evidence means that the courts must have regard to the proportionality of any request. Indeed, the court should refuse permission where reasons for the request are viewed as frivolous.

However, given that the need for additional evidence is sometimes critical to the court's ability to make an informed decision, and that the expert evidence itself is often of a highly technical nature, we ask two questions.

- How should the courts deal with such requests?
- How much influence should the experts or the parties have upon the court's decision?

Expert's role in gathering evidence

If an expert in a case feels that there is insufficient evidence before the court to prove or disprove a case, does the expert have discretion to request that further tests be carried out? If so, what is the expert's role in that evidence gathering process? These were questions considered recently by the Family Court.

In *Re. M-M (A Child)*¹, an expert witness was called in by a child's mother to report on whether unexplained fractures to her child's ulna and tibia might have been due to *osteogenesis imperfecta* (brittle bone disease). The expert examined the child and could find no indication that this was the case. However, the expert made a strong suggestion that further tests be carried out to rule out the possibility. The judge at first instance, refusing the request, said that (i) further testing was unnecessary and (ii) in making the request the expert had exceeded his brief. The mother appealed.

Experts can't demand evidence be sought...

The Court of Appeal upheld the trial judge's decision and said that there was a clear distinction between a medical issue and a forensic one. The medical decision dealt with what was clinically required to inform the proper current and future treatment of the patient; it was a decision that could be taken by the expert doctor only. The forensic decision, on the other hand, dealt exclusively with what was required to determine the legal issues in cases of disputed causation. Forensic decisions, said the Court of Appeal, were case management issues and were for the judge to decide, not the expert. The court's reasoning in this case is plain to see. In every case there must come a time when the court feels that there is sufficient evidence before it upon which to make a finding. In the civil courts, of course, such finding will be on a balance of probabilities, and the gathering of evidence should be sufficiently full to support the weight of the evidential burden.

Experts should offer guidance on what additional expert evidence might be considered

Consequently, as part of its case management function, it was for the court to determine precisely when this point had been reached. In *Re. M-M* the cost of further testing was likely to have been around £5,000 and would have taken an additional 8 weeks. The judge was perfectly entitled to take the cost and time into consideration and, indeed, has a duty to do so when considering issues of case management. In this case, he decided that there was already sufficient evidence before the court and that any benefit that might result from further testing would be outweighed by the attendant expense.

... but should say if other expertise might help

This contrasts with another case that came before the Court of Appeal this year. In *Oldham MBC -v- GW and PW*², the parents had been suspected of inflicting non-accidental injuries on their child. Following care proceedings, a decision was taken to remove the child from the parents. There then followed a 12 month separation. It subsequently became apparent that the child was suffering from a rare medical condition and that there had been no attempt by the parents to harm the child. In this case, said the Court of Appeal, the Family Court and the advising expert had got it wrong. In analysing where the mistakes had been made, Ryder J said that, in difficult cases, it was no longer sufficient for experts to leave the decision on whether there should be a second forensic opinion to the courts. He appeared to suggest in his ruling that, from the outset, the expert should be involved in this decision. The remit would include considering whether any additional expert evidence was necessary and, if so, in what discipline.

Experts should explore range of opinions

Ryder J took the view that the court and the experts might have become too focused on reaching agreements in difficult cases. He pointed out that, in such cases, areas of disagreement might be just as important as areas of agreement in reaching the right judicial decision. To highlight this, he said that it was not sufficient for experts simply to be asked whether their opinion was orthodox and mainstream, but experts should also be asked to report:

- what the range of orthodox opinion might be, and
- whether, within that range of opinion, the cause of injury could be stated as unknown or undetermined.

If there were unusual features in a case that might give rise to alternative opinions, the expert should highlight these and take the court through the range of alternative diagnoses. In appropriate cases, then, it would probably be open to the expert to suggest that further evidence be obtained, or even that an additional expert be instructed to report on matters which are inconclusive or outside the current expert's

field of competence. Provided circumstances allow, the court is likely to attach considerable weight to an expert's request when making decisions in relation to forensic issues.

Give the court the fullest picture

The final decision on whether additional evidence or forensic investigation is necessary for the proper determination of the issues is one that rests with the court. Yet the boundary between medical and forensic decisions identified in *Re. M-M* is a valid one. However, the decision in *Oldham* makes it clear that the expert has a duty:

- to assist the court in this process, and
- to bring to the attention of the court any issues likely to inform that decision.

The expert must not stray into the role of decision maker, said the court. Indeed, at the earliest stage the expert should be asked for – and in any event should volunteer – an opinion on whether another expert is required to bring expertise not possessed by those already involved and, if possible, what question(s) should be asked of that expert. The court asked that there be an amendment to the Code of Guidance for Expert Witnesses in Family Proceedings to incorporate this recommendation.

Claimant's right to seek additional evidence

A recent case before the Employment Tribunal considered a similar request to that of the expert in *Re. M-M*. This time, though, it was the claimant who made the request, not the expert.

In *The Hospice of St Mary Furniss -v- Howard*, the nursing director of a hospice, Mrs Howard, claimed compensation of around £0.5 million. She alleged unfair dismissal due to disability discrimination. She had been absent from work with what she said was a bad back and had been dismissed from her post following an orthopaedic report and an MRI scan which failed to reveal any significant pathology. The Hospice disputed that she was disabled within the meaning of the discrimination legislation or that her complaint was genuine.

A jointly instructed medical expert found that Mrs Howard was, indeed, suffering from a back complaint, but he was not able to diagnose its precise cause or extent. As the expert was unable to clarify his findings, the Hospice asked its own independent expert to provide a report using only the documentary evidence garnered to date. He concluded that Mrs Howard suffered from 'low-level intermittent symptoms' and that these were 'unlikely to affect her day-to-day activities'. Relying on this, the Hospice requested that Mrs Howard be physically examined by its expert, with a view to producing a full medical report.

The Appeals Tribunal considered the request. It ruled that the Hospice had taken proper steps in agreeing to the appointment of a single joint

expert and in subsequently seeking clarification of his report. In the absence of any clear conclusions in relation to the diagnosis of her medical condition, there was insufficient material upon which the tribunal could base its finding. Given that the existence of a real condition was an issue in the case, it was open to the Hospice to adduce evidence in relation to this. The initial report of the Hospice's own expert based on the documentary evidence had suggested that the claimant's symptoms were low level. Therefore the reason put forward by the Hospice for seeking a full medical report was not a fanciful one and so the tribunal allowed the request.

As in the case of *Re. M-M*, the tribunal was obliged to consider the proportionality of the request for further expert evidence. In *Re. M-M*, the trial judge considered the additional time and expense to be disproportionate to any benefit that might accrue from the additional evidence. However, in *Howard*, the tribunal took the view that the large sum sought in compensation by Mrs Howard, and the fact that the first expert's report was inconclusive, meant that the additional expense and time could be justified. It was held that a respondent should be permitted to seek further medical evidence to disprove the genuineness or basis of a complaint if it acts reasonably and the action would be proportionate in the circumstances.

Seriousness of the sanction relevant

There is, perhaps, one other instance in which a request for additional expert evidence might be granted in circumstances where it could otherwise be thought unnecessary or disproportionate.

In *Re. B (A Child)*⁴ the parents of a baby in care proceedings appealed against a refusal by the judge to allow them to instruct independent experts. The judge had taken the view that there was nothing relevant that could be added to the reports already obtained by the local authority. The Court of Appeal acknowledged that, in proceedings where parents were running the risk of being separated from their child forever, there was a great need for them to have confidence in the fairness and even-handedness of the court procedure. In refusing them the right to test the evidence of the local authority-appointed experts, there was a danger that the court might be perceived as biased.

Accordingly, the Court allowed the appeal, notwithstanding the trial judge's view that nothing useful was likely to be added and despite the additional time and expense involved. In this case the interests of natural justice demanded a balanced approach. The Court of Appeal was also mindful that if the parents's expert agreed with the local authority's expert, there was a chance that the proceedings would be abbreviated.

Court likely to give considerable weight to expert's views

Reference

¹*Re. M-M (A Child)* [2007] EWCA Civ 589.

²*Oldham MBC -v- GW and PW* [2007] EWHC 136.

³*The Hospice of St Mary Furniss -v- Howard* UKEAT/0646/06/MAA.

⁴*Re. B (A Child)* [2007] EWCA Civ 556.

Court digest

Recent years have seen a marked increase in the number of applicants seeking political asylum in the UK. As in all other legal arenas, experts have had a role to play in such applications. We begin our case review with two recent asylum cases in which expert evidence was an issue.

Tribunal must explain rejection of evidence
In *CM (Kenya) -v- Secretary of State for the Home Department*¹ a Kenyan national had applied for asylum in Britain on the ground that she had heard her father say that she was to undergo 'female circumcision'. Before leaving for Britain she had fled to Nairobi, where she had hidden for 4 months and found employment. Her application relied on expert evidence that if she was to return to Kenya, she was likely to come into contact with violent groups opposed to her refusal to undergo female circumcision; it was also likely that her father would be able to find her.

The immigration tribunal refused the application, saying that it would not be unduly harsh to return her to Kenya, and the chances of her father finding her were remote. This was despite the evidence to the contrary in the expert's report.

The tribunal gave no explanation as to why the expert evidence had been rejected. The applicant appealed against the tribunal's finding on the ground that there was ample evidence in the expert's report to support a conclusion that she would come to harm if deported. The State contended that it was not reasonable for the tribunal to address each and every point raised by the applicant. Somewhat bizarrely, the State also contended that it was not required to address specifically those points made in the expert's report setting out the circumstances in which the applicant's father was likely to discover her whereabouts.

On appeal, the Court said that the tribunal was entitled to take the objective view that the applicant was unlikely to come to harm, particularly in Nairobi. However, in deciding what risk the applicant faced personally, the tribunal should have had regard to the circumstances identified in the expert's report. Notwithstanding that the tribunal might have had good cause to reject the expert's findings, it had made an error in law in failing to give its reasons for so doing. The applicant's appeal was therefore upheld.

Experts must not assess witness credibility

The second tribunal case is *HH (Ethiopia) -v- Secretary of State for the Home Department*². The applicant was an Ethiopian national who claimed to have been arrested, interrogated and beaten due to her suspected connection to a separatist political organisation.

The expert medical evidence confirmed that she had scarring on her body consistent with

beating, but the expert also found that the nature of the beating the applicant described did not typically leave scarring. However, the expert took the view that, on balance, the applicant's allegations were *truthful*, and she suggested that any discrepancies could be put down to the trauma suffered by the applicant.

The Asylum and Immigration Tribunal upheld the decision of the Immigration Judge, who had not found the applicant's account credible. He also found that there was 'tension' in the expert's report since it said that the scarring was consistent with abuse that would normally not leave scars. On this basis he decided to reject the expert evidence. The applicant appealed.

As in *CM (Kenya)*, one of the grounds for the appeal was the alleged failure of the tribunal to give proper weight to the expert evidence and, specifically, to the tribunal's failure to address the expert's suggestion that inconsistencies in the applicant's claims were attributable to trauma. In dismissing the appeal, the Court said that it was not the role of a medical expert to assess the applicant's credibility. The remit of the expert was limited to the medical examination of the applicant to establish whether the injuries were consistent with her version of events. It was for the judge to decide issues in relation to the applicant's credibility on examination of all the relevant evidence.

The judge's failure specifically to address the suggestion of trauma was, perhaps, a more difficult question for the appeal court. Had it followed the reasoning in *CM (Kenya)*, one might expect the applicant to be given the benefit of the doubt because it might reasonably be suggested that the immigration judge had made an error in law. However, the appeal court took the view that the judge had taken the report as a whole into account. He had been entitled to reject it on the grounds of the tension he had perceived within it. The expert's belief that the applicant's account was a truthful one was irrelevant and outside the scope of her expertise.

Employed expert impartiality

The independence and impartiality of an expert is an issue cited frequently when seeking to challenge credibility, particularly when the expert has an association with one of the parties.

In *Gallaher International Ltd -v- Tlais Enterprises Ltd*³ the defendant company sought an order that expert evidence be ruled inadmissible because the expert was an employee of a company associated with the claimant. The claimant was a manufacturer of cigarettes and the defendant was a Cypriot company that was the exclusive distributor of the claimant's products in certain territories.

The claimant sought to show that it had validly terminated the distribution agreement and wished to adduce evidence concerning industry practice. The defendant applied for an order that

Court must give reasons for rejecting expert's findings

Connection to a party does not automatically bar expert from acting

the employee of the claimant's associated company was not suitable as an independent expert.

In refusing the application, the court pointed out that the fact of the expert's employee status had been made plain. The court was satisfied that he understood his overriding duty to the court. The court had considered the availability of a suitable alternative but found that this was an area in which experts were scarce. So the court was satisfied that the expert appointed by the claimant was suitably qualified.

Cross-examination of SJEs

It is a frequently held, but mistaken, belief that an SJE cannot be cross-examined.

In *Re. S (A Child)*⁴ the parties to child contact proceedings had jointly instructed a child psychiatrist to make recommendations in relation to parental contact. She had recommended in her report that the father should maintain contact with the child. As is usual, the expert was not present in court when the judge considered the application. Upon consideration of the report, the trial judge rejected the expert's recommendation, having taken the view that the expert had failed to give proper consideration to the practicalities of paternal contact. The judge thought that it was in the best interests of the child to deny contact with the father.

The father appealed on the ground that the trial judge was wrong to reject the expert's opinion without hearing oral evidence from her. He argued that there should be a rehearing with the expert in attendance. Lawyers for the child's mother argued against this because the expert was under joint instruction and it would not be permissible to cross-examine her at a rehearing. The Court of Appeal found that the trial judge had failed to appreciate the effect of his decision. In refusing contact he had effectively (though unintentionally) ruled out any form of future contact by the father. In view of the finality and far-reaching consequences of his decision, it was unreasonable for the judge to criticise and reject the expert's recommendations without hearing her evidence and her response to his own findings. The court rejected the mother's submission that it was not open to cross-examine the SJE at a rehearing, and said that it was permissible for an SJE to be cross-examined in family cases. Accordingly, the court ordered a rehearing at which the expert was to be in attendance.

Compromise agreements and experts

In the case of *Bruce & Others -v- Carpenter & Others*⁵ Mr Justice Jarvis QC was required to consider the court's ability to interfere with the findings of an expert valuer whose valuation had been prepared pursuant to a compromise agreement reached by the parties.

The applicants and respondent were shareholders in a company (X) that managed a non-profit making company (Y). They had all entered into a compromise agreement where Bruce was to be paid by company X a sum equal to the value of his shareholding, such sum to be determined by an arbitrator in accordance with the terms of her letter of engagement. The arbitrator duly stated her expert valuation of the shareholding, but an issue then arose as to whether company Y was entitled to the payment of certain income. The arbitrator decided that resolution of that issue involved the interpretation of a clause in the compromise agreement, which, she maintained, was outside her area of expertise. Quite properly, she communicated her difficulty to the parties.

Consequently, Bruce issued an application to the court for a declaration that in valuing his share in company X the arbitrator was bound to take the income into account. Carpenter argued that the court did not have the jurisdiction to interfere with an expert valuation by imposing its own view on a particular aspect of the valuation and sought to have that part of Bruce's claim struck out. Bruce, on the other hand, contended that the court did have a power to intervene in circumstances where the expert valuation process had clearly broken down.

It was held by Mr Justice Jarvis that it was the job of an expert who took on the task of valuation to form a view and make difficult decisions, even if such decisions lay outside the expert's area of expertise. It was, of course, open to the expert to indicate to the parties the difficulties and concerns faced, but it was then up to the parties as to whether they wished the expert to continue or whether they should introduce another element to assist the expert in arriving at a decision. In this case, the parties had agreed the choice of expert and, in the compromise agreement, had agreed that she should be allowed to form her own views and to give her results without having, necessarily, to provide a reason for her conclusions. The court saw this as a fundamental difficulty with Bruce's claim and pointed out that, in entering into the compromise agreement, he had committed himself to a specific method of valuation, namely a private valuation by one named person. His application requiring that part of the valuation should, instead, be carried out by the court was the total antithesis of a private expert valuation. Accordingly, if the court interfered it would be doing the opposite of the agreement reached previously between the parties. The judge concluded that, where parties had chosen to select a particular expert method to resolve a question, then recourse to the courts on that question was non-existent, save where the expert machinery had broken down. Accordingly, that part of Bruce's claim was struck out.

References

¹*CM (Kenya) -v- Secretary of State for the Home Department* [2007] EWCA Civ 312.

²*HH (Ethiopia) -v- Secretary of State for the Home Department* [2007] EWCA Civ 306.

³*Gallaher International Ltd -v- Tlais Enterprises Ltd* [2007] WL 1133226.

⁴*Re. S (A Child)* [2007] EWCA Civ 356.

⁵*Bruce & Others -v- Carpenter & Others* [2006] EWHC 3301 (Ch) .

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