Your Witness

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

Keep it short!

A judge is much like Goldilocks... if you substitute 'expert report' for 'porridge' and 'length' for 'heat', that is. They like their expert reports neither too long nor too short, but just the right length. It means that **really good expert witnesses strive to produce clear and concise reports dealing only with the matters upon which they are offering opinions**.

In *Harman -v- East Kent Hospitals NHS Trust* [2015] *EWHC* 1662 (*QB*), Mr Justice Turner turned his sights on the care reports adduced in the case. He said that there '*... is a regrettable tendency for experts to produce reports which are simply far too long.*' This complaint has been voiced previously by Sir James Munby, President of the Family Division of the High Court of England and Wales. He commented:

> *'… too many expert reports… are simply too long, largely because they contain too much history and too much factual narrative… I want to send out a clear message: expert reports can in many cases be much shorter [and] be more focused on analysis and opinion than on history and narrative. In short, expert reports must be succinct, focused and analytical [as well as being] evidence based.'*

When it comes to expert reporting, those experts who communicate their opinions in a clear and concise manner, and remove all unnecessary material, are the experts most likely to see repeat business. Such reports minimise the time it takes the court to consider the issues, reduce the cost to the system and lower the risk that important points get missed.

So, what are the key elements in achieving such concision in your report?

- Clearly **separate fact from opinion**.
- Make sure **every opinion links to its underpinning facts**.
- Having gone through all the opinions, **any facts not linked to an opinion are mere padding and should be removed**.

Is your spare room filling up?

We have had a spate of questions around the general topic of how long an expert should keep documents from old cases. Any documents that are received, prepared, assessed, considered and created by an expert in the course of proceedings are papers of significance. Indeed, a document which at the time of the original hearing might have been considered trifling could suddenly take on new importance. It is not inconceivable, therefore, that an expert witness might be asked for a document months or years after the original case has been concluded. The expert, then, is faced with a dilemma. Which documents in a case should be retained – and for how long?

We considered this in some detail in issue 50 of *Your Witness*, back in 2007 (all issues are freely available to members at *www.jspubs.com/Experts/library*). But to summarise the key points:

- Experts will want to keep documents because the **wheels of justice often grind very slowly, meaning trouble can take a while to surface**.
- Retaining documents is **linked to the duty experts owe to both the court and those who instruct them**.
- We draw a **distinction between documents experts are sent and those they create**. Many of the former will be copies of originals and so can often be safely (and securely) destroyed in due course.
- Reviewing the various statutory limitation periods, we conclude that **while 6 years is a common time interval to contemplate, the specific nature of a case may dictate a longer period of retention**.

For a fuller discussion, turn to *Your Witness* 50.

Of course, since 2007, scanner technology has progressed significantly. So a room full of paper then might now be rendered down to a single 1Tb portable hard drive that occupies less space than a copy of our *Expert Witness Year Book*!

New edition of the Register

Preparations for the new edition of the *UK Register of Expert Witnesses* have begun. It hardly seems possible that the next edition will be our 29th. So, as we approach our fourth decade, I've been looking at our retention rates, i.e. how many experts stay with us year on year and so must be happy with what we offer. Every edition sees some experts leave us as they retire, etc. But I'm delighted to report an excellent retention rate, comfortably above 90%, for every edition. Indeed, we have almost 1,200 experts who've been members for at least 10 years, and a very dedicated cohort of 873 experts who have been with us for over 15 years!

Of course, we are always looking to innovate and add value to your membership. So please do let us know of anything that you think we can do to enhance our service to you.

A draft of your entry for edition 29 will be sent out over the New Year for you to check, sign and return. If you will be away during the first half of January, you may wish to contact us now to make alternative arrangements.

Meanwhile, everyone here at J S Publications sends their very best wishes to you for a Happy Christmas and prosperous New Year.

Chris Pamplin

Inside

Issue 82

December 2015

Litigation funding... a guided tour

UK leads the world in alternative funding methods

The relentless erosion of legal aid in England and Wales over the last two decades has resulted in a significant growth in alternative methods of funding for parties to litigation. Both the reduction in the scope of legal aid and concerns about access to justice have made Parliament, and the courts, much more receptive to alternative funding arrangements offered by solicitors or third parties. Hence the spawning of an industry of products and organisations geared towards providing this service. The proliferation has been so rapid that the UK now has more specialist funding companies than any other jurisdiction in the world. Indeed, it is the only jurisdiction to have a Code of Conduct specifically for litigation funding.

The range of funding options on offer can be somewhat bewildering – not only for litigants, but for lawyers and other professionals, too. Following a number of related queries from experts received recently on our *Register* Helpline, we take this opportunity to compile a brief guide.

Funding options

There are currently five broad options available to litigants, other than self-funding or public funding through traditional legal aid. These can be summarised as follows.

- **Damages-based agreement** (DBA): the solicitor assumes all the risk of the client's legal fees in the event of a loss in return for a share of the proceeds.
- **Conditional fee agreement** (CFA): the solicitor assumes the risk for some, or all, of the client's legal fees if the client should lose.
- An indemnity for legal expenses in the form of **after the event (ATE) insurance**.
- Pre-existing cover for legal expenses in the form of **before the event (BTE) insurance**, union funding, etc.
- **Third party funding** where a commercial funder agrees to pay some or all of the claimant's legal fees and expenses in return for a fee.

Five broad funding options in common use

While it is not mandatory for a solicitor to offer alternative funding options to his clients, their potential availability (including from other firms) must be mentioned as part of the general advice and guidance solicitors are required to give in relation to funding, fees and costs.

Damages-based agreements

DBAs are a form of **contingency fee** and historically were prohibited because of the fear that they could create a conflict of interest between the lawyer and the client. However, since 1990 DBAs have been permissible in employment cases, and in 2010 (in Jackson LJ's final report of his review of civil litigation costs) it was suggested that lawyers should be permitted to enter into contingency fee agreements in civil litigation generally. Consequently, section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 now permits contingency fee arrangements in all civil litigation matters with effect from 1 April 2013.

A DBA is a form of 'no win, no fee' arrangement between a solicitor and a client. It provides that the client will make a payment to the solicitor if the client obtains 'a specified financial benefit' (usually damages paid by an opponent). The payment will be calculated as a percentage of the damages received by the client. The agreement provides that an unsuccessful client will not have to pay the solicitor or legal representative for the work carried out under the agreement. The client will, however, still be potentially liable for adverse costs, and these may be covered by after the event (ATE) insurance, which we will consider shortly.

It is worth noting that there is no requirement in the rules to notify the opponent, or the expert, of the existence of a DBA. Experts would do well, therefore, to raise this specific question before accepting instructions.

Conditional fee agreements

A CFA is an agreement that provides for a lawyer's fees and expenses to be payable only in specified circumstances. CFAs typically provide that if the case is lost, the client will not be liable to pay the fees and any expenses subject to the CFA. If the client wins the case, all fees and expenses, including the conditional fees and any 'success fee', become payable. A winning client will normally recover these fees and expenses from the losing party. Prior to 1 April 2013, recovery included the success fee. However, since then, success fees are no longer recoverable in most cases and will be borne by the client.

It is worth noting that CFAs are not limited to proceedings where legal aid or other public funding is unavailable. A litigant is entitled to enter into a CFA notwithstanding the availability of such public funding, provided the CFA is a reasonable choice for the claimant at the time, having regard to all the circumstances.

Before the event (BTE) insurance

BTE insurance is cover purchased prior to any dispute arising. Typically, BTE insurance might form part of a household or motor insurance policy. Pre-existing indemnity may also take the form of the benefits of union or professional body membership, paid by annual subscription. It usually includes legal fees and disbursements up to a specified limit.

After the event (ATE) insurance

ATE insurance is a type of insurance policy that can be taken out to cover legal expenses after a dispute has arisen. It was introduced as part of the general changes made to legal funding following the erosion of legal aid and the attendant concerns in relation to access to justice. While CFAs are designed to cover the

litigants' liability for their own legal costs, they do not offer any protection against adverse costs if a litigant fails to win the case. Consequently, ATE insurance was introduced in 1999 and the insurance premium was recoverable from the other side by way of costs. However, this recoverability was largely removed in 2012. It has had the effect of levelling the playing field between CFAs and other types of third-party funding and ATE insurance because litigants now have to pay something, no matter what type of funding they choose.

ATE insurance typically covers the insured party's disbursements, including an expert's fees, and liability for an opponent's legal costs. In this respect, they are designed to deal with the risks not incorporated in a CFA. It is common, therefore, for cases to be funded by a mixture of a CFA and ATE insurance. Indeed, the ATE insurance premium can in many respects be regarded as similar to a CFA success fee.

Third-party funding

Third-party funding is any arrangement where a party with no prior interest in the proceedings agrees to finance the legal costs (whether in whole or in part) in consideration for a fee payable by the funded litigant from any proceeds recovered as a result of the litigation. Currently, such arrangements can be used, if necessary, in conjunction with the above-mentioned distinct categories of funding. The most common instance is, of course, where public funding is not available and the litigant is otherwise unable to meet the costs of proceedings from personal resources.

Expenses and disbursements

CFAs are designed to cover the provision of all legal services, which are defined as 'any services which it would be reasonable to expect a person who is exercising, or is contemplating exercising, a right to conduct litigation in relation to any proceedings, or any contemplated proceedings, to provide.'

In addition to a lawyer's professional fee, the regulations refer to 'expenses'. Consequently, it is possible to make the payment of a solicitor's disbursements, including expert fees, conditional on the outcome of a case.

There are obvious drawbacks to this for lawyers and other providers of legal services: there is a real risk that the disbursements will not be recoverable if the client fails to win the case. Consequently, most firms exclude disbursements from any CFA. An exception is sometimes made for counsel's fees in cases where counsel has agreed that his fees will be subject to a separate CFA.

Expert witnesses will have an interest in this because the CFA may potentially impact on the manner in which their fees are paid. Experts are, of course, normally retained by instructing solicitors, not by the client, and their contractual relationship will be with the solicitor. So experts will need to make sure that their retainer letters, or their terms of engagement, are sufficiently well drafted to ensure that the timing and manner of payment of their fees is set out clearly. Not doing so may well result in problems getting paid, e.g. being expected to wait for settlement of their fee until the solicitor has been paid by the client or the third-party funder or, worse still, until conclusion of the case.

Expert fees can get caught up in the funding arrangement

Payment of the expert should never be made conditional on the outcome. To do so would seriously call into question the expert's impartiality and independence, and breach the expert's duty to the court. It may also offend against the doctrine of champerty, which prohibits third parties from involvement in cases in which they had no prior interest in the outcome. Champerty is a public policy to preserve the purity of justice where, for example, a third party might be tempted to manufacture evidence or inflate claims. However, from the foregoing, it will be obvious that the venerable doctrine of champerty is becoming a bit of an anachronism!

Assignment of CFAs

One particular situation to beware is when a client changes solicitors. As a general rule, the benefit and burden of a contract cannot both be assigned. However, the court has held that such a transfer could occur where a client moves with a solicitor from firm to firm.

The current position appears to be as set out in *Jones -v- Spire Healthcare Limited* (Liverpool County Court, 11 September 2015, case number A13YJ811). In this case it was held that any purported assignment of a CFA from one law firm to another was in breach of the rule against the assignment of personal contracts. Experts will need to be aware, therefore, that a change of solicitor may have adverse implications for any funding agreement that might previously have been in place.

Conclusion

It will be clear from all of the above that while experts are not themselves involved directly in funding arrangements, there are a number of factors that can impact on how cases are managed and the way in which experts are paid. Experts may find themselves being asked to accept payment in stages, to accept deferred payment or, at worse, to suffer a reduced payment. Cash-strapped solicitors may invoke all manner of tales of woe to seduce experts into a less than satisfactory arrangement. The advice, as always, is to **ensure that you have well drafted terms of business that leave no doubt as to the solicitor's contractual obligations and the mechanics of payment**. It would be wise to ask at the outset how the solicitor's client is proposing to fund proceedings and to monitor any changes that might occur.

As always, experts should protect themselves through their contracts

Court's discretion to admit expert e

Courts should only allow expert evidence that is 'reasonably required'

The courts are given wide powers to control the number of expert witnesses instructed in a case. But the exercise of such powers often gives rise to procedural challenges by one or other party. This was the position recently in the Court of Appeal when it heard a case against a refusal to permit a party to call expert evidence.

Start with the CPR

We should start, of course, in the Civil Procedure Rules (CPR). A specific duty for the court to limit expert evidence is contained within CPR 35.1 which states that:

> *'Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings'.*

This rule has the underlying objective of reducing the inappropriate use of expert evidence. It must be said that the interpretation of this rule by the courts has not been entirely consistent!

In 2001, Evans-Lombe J, hearing the case of *Barings*[1], made the following statement on the admissibility of expert evidence:

> *'... expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issue in the case justly.'*

In general, the courts have seen their duty under the CPR to be to reject expert evidence not reasonably required to resolve proceedings. Aikens J said in 2006, in the case of *JP Morgan Chase*[2]:

> *'There is a tendency to think that a judge will be assisted by expert evidence in any area of fact that appears to be outside the "normal" experience of a Commercial Court judge. The result is that, all too often, the judge is submerged in expert reports which are long, complicated and which stray far outside the particular issue that may be relevant to the case. Production of such expert reports is expensive, time-consuming and may ultimately be counter-productive. That is precisely why CPR Pt 35.1 exists. In my view it is the duty of parties, particularly those involved in large scale commercial litigation, to ensure that they adhere to both the letter and spirit of that Rule. And it is the duty of the court, even if only for its own protection, to reject firmly all expert evidence that is not reasonably required to resolve the proceedings.'*

Court's rigid interpretation of the rules has begun to relax of late

This was a perceived duty rigorously adhered to by the courts, certainly in the years immediately following the CPR reforms and after austerity measures forced cuts to court budgets and public funding. However, more recently there may have been some relaxation in what had become a somewhat dogmatic approach.

A less dogmatic approach?

In 2014, Warby J said[3] that the court's duty under CPR 35.1 to restrict expert evidence to that which is reasonably required did not, in his view, impose a test of absolute necessity. Instead, a judgment should be made in each case before the evidence is heard and evaluated. He concluded that '*... evidence which it is credibly said could conclusively determine the single most important issue in the case meets the criterion in the rule.*'

The question of how the court should exercise its discretion to admit or exclude expert evidence came back before the High Court this year in *British Airways plc -v- Spencer & Others*[4]. In delivering its ruling, the court took the opportunity to set out the relevant principles to be applied when deciding whether expert evidence should be admitted.

The proceedings were brought by British Airways against trustees of its pension scheme regarding proposed pension increases. The court recognised that the decision would be of very great importance to the parties. For British Airways, possibly hundreds of millions of pounds turned on the outcome of the case, and it wished to adduce all the evidence that could possibly help it. For the trustees (and the beneficiaries of the Scheme), a final resolution of British Airways's claim was required urgently. Indeed, the trustees were forced to withhold the increases to which British Airways said the pensioners were not entitled. Many of the pensioners were elderly, with deaths occurring amongst their number while the litigation worked its way through the system.

The fear was that the admission of allegedly irrelevant expert evidence would further delay the resolution sought. In view of this, a deputy master at first instance had refused British Airways leave to call, or rely upon, expert evidence on the grounds that points raised in the pleadings on which British Airways suggested expert evidence would assist were, in fact, '*... eminently capable of being determined by the judge at trial as issues of fact and law without the assistance of expert evidence*'.

British Airways appealed the decision of the deputy master on the grounds that, amongst other matters:

- he had erred in fact and/or law in failing to take into account or even record in the judgment that the trustees had conceded the need for some actuarial evidence
- he had applied the wrong test; in particular, it was said that he wrongly considered that to admit expert evidence it must be reasonably required in order to determine a specific issue in dispute

- he was wrong to refuse to admit the expert evidence because he thereby tied the hands of the trial judge, preventing British Airways from presenting its case properly, and
- he had erred in reaching his conclusion concerning the safe harbour principle (i.e. that the trustees's acts meant that they could not rely on the principle) in that (i) he failed properly to understand British Airways's case and (ii) he thus failed properly to understand the importance of actuarial evidence in establishing that case.

Helpful, even if not determinative

Warren J considered the underlying intention of CPR 35.1 and the subsequent case law. In recognising that evidence can be helpful even if it is not determinative of an issue, the court acknowledged the finding of Warby J in *Mitchell*, that the requirement for the evidence to be '*reasonably required to resolve the proceedings*' does not impose a test of '*absolute necessity*'. The court considered that it was, instead, necessary to exercise discretionary judgment in each case. Evidence that, credibly, could conclusively determine the most important issue in the case would meet the criteria.

Warren J cautioned, though, that this is:

'... saying something very different from the proposition that, because expert evidence may prove of assistance, it should be admitted. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).'

Having consideration for all these factors, the judge concluded the following.

- In all areas where actuarial evidence might be of some assistance to the court, it should be admitted and should not be excluded on grounds of proportionality or otherwise.
- In cases where actuarial evidence is necessary to resolve a pleaded issue, it should clearly be admitted and it should be excluded only if the issue is struck out or excluded from consideration pursuant to the court's case management powers.
- In areas where the evidence would be of assistance, but not necessary to offer the resolution of an issue, it should be admitted.

Factors in favour of admitting evidence

Warren J went on to set out some of the particular factors in the case that had supported the admission of the expert evidence.

(a) A very large sum of money turned on the outcome of the case for British Airways. Provided that this did not result in unfairness to the trustees, or to a wasting of court time, British Airways should be entitled to put its best case and to adduce the evidence it reasonably considered would advance its case.

(b) It was undesirable to tie the hands of the trial judge if that could be avoided. Although the discretion under CPR 35.1 was there to prevent a party simply trying to bolster its case by the inappropriate use of expert evidence, that was not, as Warren J saw it, the present case. On some aspects of the case, it was right that any doubt about the amount of assistance the court might gain was best resolved in favour of British Airways as the 'person' wishing to adduce it, subject to the same proviso as just expressed.

(c) If the trial judge decides at an early stage of the proceedings that the evidence will not assist him, the judge will be able at that point to decline to receive the evidence in accordance with the wide-ranging trial management powers available.

Against these conclusions, however, Warren J felt it needful to ensure that the result was not oppressive and unfair. In his view, the only points of any substance in relation to that suggestion were as follows.

(a) To allow expert evidence would give British Airways a roving brief to commission any amount of actuarial evidence involving not only its own expert but also the trustees's expert in trawling through thousands of pages of documents that would be of no, or at best only the most marginal, relevance. This would be a total waste of time and cost.

(b) To allow expert evidence would result in lengthy expert reports which, far from assisting the court, would be burdensome and a waste of judicial time and energy.

(c) To allow expert evidence would also result in undue disruption of preparations for trial.

In this case, the judge did not think that there was much weight in those points, and certainly not enough to displace the factors in favour of admitting the evidence.

Conclusion

Following so swiftly on the heels of *Mitchell*, the *British Airways* case can be seen as a definitive statement of the questions to be asked by the courts in deciding whether to admit expert evidence.

'Reasonably required' does not amount to 'absolute necessity'

References

[1] *Barings plc -v- Coopers & Lybrand* (No 2) [2001] *EWHC Ch* 17.

[2] *JP Morgan Chase -v- Springwell* [2006] *EWHC* 2755.

[3] *Andrew Mitchell MP -v- News Group Newspapers Limited* [2014] *EWHC* 3590 (*QB*).

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

Compellability of expert witnesses

All witnesses can be compelled to appear in court...

It is a general principle of English law that anyone who is competent to give evidence is also compellable as a witness, i.e. the court can require the person to attend court. Although a witness may claim privilege in relation to the answering of certain questions, this does not prevent them being called and from being required to co-operate fully in the proceedings.

The court can compel an unwilling witness to attend using a subpoena – now commonly called a witness summons. A witness who, without reasonable excuse, refuses to attend or to answer admissible questions put to them will be in contempt of court, and that carries severe penalties.

Witness of fact -v- expert witness

In theory, the law makes no distinction between witnesses of fact and expert witnesses. However, in practice, the courts exercise discretion in deciding whether an expert witness should be compelled to appear.

The English courts will generally oblige a witness of fact to testify to a fact in issue. They will not, as a general rule, require a person to give expert evidence against the expert's wishes in a case where the expert has had no connection with the facts or the history of the matter in issue. This was a principle laid down by *Seyfang*[1], a case in which the court refused to order the attendance of two distinguished medical experts who both held high-profile university positions and had no connection with the case.

By way of clarification and enlargement of this principle, Kerr J in *Lively*[2] said:

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

The question came before the court once again in *Harmony Shipping*[3]. The handwriting expert in that case had inadvertently advised both sides, which isn't as uncommon as one might think! The defendant issued a subpoena requiring the expert's attendance and the plaintiff applied for an injunction to restrain him from so doing. This case differed from those previously in that it was one of the parties seeking to set aside the subpoena rather than the expert witness himself. However, the basis on which the Court of Appeal dealt with the request has application to both.

... although experts are often able to side-step the call

Lord Denning, then Master of the Rolls, took the view that an expert was in the same position as a witness of fact, and the Court was entitled to have his evidence, except for any matter that was protected by legal professional privilege. Waller LJ, however, said that while there was no relevant difference between a witness of fact and an expert as a matter of general rule, that general rule could not have universal application because every case must depend on its own facts. This was echoed by Cumming-Bruce LJ, who stated in his judgment that:

> *'... the court has a discretion in the case of an expert, whether or not it has any discretion in the case of a witness of fact. It will take into account:*
>
> *(i) that the court is prima facie entitled to every man's evidence, whether of fact or opinion;*
> *(ii) whether the expert has some connection with the case in question;*
> *(iii) whether he is willing to come, provided that his image is protected by the issue of a subpoena;*
> *(iv) whether attendance at court will disrupt or impede other important work that he has to do; and*
> *(v) whether another expert of equal calibre is available.*
>
> *There may well be other relevant considerations. In particular, it is fairly arguable that an officer or employee of one party should not be called as an expert by the other unless that is necessary for justice to be done.'*

Distinguishing fact from opinion evidence

The principle laid down by these cases seems clear enough. But a situation might arise where the distinction between opinion evidence and factual evidence is not clear cut. This was precisely the position in *Aktieselskabet*[4]. A guide to distinguishing between factual evidence and expert evidence was given by Hobhouse J, who said:

> *'... one can analyse the matter in this way: First, evidence is adduced which can be described as direct factual evidence, which bears directly on the facts of the case. Second, there is opinion evidence which is given with regard to those facts as they have been proved; and then, thirdly, there is evidence which might be described as factual, which is used to support or contradict the opinion evidence. This is evidence which is commonly given by experts, because in giving their expert evidence they rely upon their expertise and their experience, and they do refer to that experience in their evidence. So an expert may say what he has observed in other cases and what they have taught him for the evaluation for the facts of the particular case. So also experts give evidence about experiments which they have carried out in the past or which they have carried out for the purposes of their evidence in the particular case in question.'*

In *Society of Lloyd's*[5], the threads of all these previous cases were pulled together in the judgment of Staughton LJ. The case involved a subpoena requiring the attendance at court of Mr David Rowland, the Chairman of Lloyd's, to testify as an expert witness for the defence in an action to recover monies paid from Lloyd's central fund to discharge the defendant's underwriting debts. Mr Rowland had appealed

against the decision of the lower court in granting the subpoena and in dismissing his application to have it set aside.

The defendant sought to show that Mr Rowland would give evidence of both fact and opinion, and so was partly an expert and partly a witness of fact. However, the court dismissed this on the test established by *Aktieselskabet* and dealt with the appeal purely on the basis that Mr Rowland was being subpoenaed as an expert witness.

Citing the aforementioned cases, Staughton LJ reiterated that the court had discretion whether to compel an expert to appear as a witness. Although the court was on the face of it entitled to every person's evidence, whether of fact or opinion, it would also take into account the factors identified by Cumming-Bruce LJ in the *Harmony Shipping* case.

In *Society of Lloyd's*, the court was not satisfied that Mr Rowland was the only expert who could provide the evidence required by the defence, although he might have been the best qualified to do so. It might therefore be necessary to call more than one expert to cover the same ground. The court recognised that the witness held an important office and was a very busy man whose task was to produce a solution to the problems confronting Lloyd's. Consequently, he should not be expected to spend an appreciable amount of time in court and in preparation unless it was essential. The court had discretion whether to compel an expert to appear as a witness, and these were some of the matters it could take into account. Accordingly, the appeal was allowed and the order and subpoena set aside.

These cases deal with the compellability of experts who had been unwilling to give evidence from the onset of proceedings. At that point the parties would, of course, be free to appoint a more willing witness. The position is less clear, though, when an expert simply changes his mind mid-way through proceedings and becomes unwilling to act further.

When an expert steps aside

In *Adams -v- Allen & Overy*[6], an expert who had originally been instructed on behalf of the plaintiff changed his mind and declared himself unwilling to give evidence. The plaintiff made an application to the court to appoint a new expert, and the judge refused the application on the ground that the unwillingness of the original expert to give evidence was not a good and sufficient reason to allow a change. This decision was overturned on appeal. Foskett J said that:

> *'... where an expert had had a significant involvement in the matter pre-action, some reason would usually need to be shown for changing the expert and that reason should not be obviously bad. While there was a threshold to be crossed, the bar was not fixed and the strength of the reason could be assessed by reference to the potential consequences of not accepting it. Here, the fact that the expert did not wish to continue constituted a good reason for wanting to change him. Not allowing new expert evidence would have significantly unbalanced the fairness of the trial.'*

In *Adams*, then, there was no application to subpoena the unwilling expert and so the court was not called upon to consider the exercise of its discretion. In a case where the expert had had a significant involvement from the outset and the proceedings were very advanced, it is, perhaps, more likely that the court would order the expert's attendance, having regard to time and costs and the fact that the expert had acquired a connection with the case, particularly if there was a shortage of other suitable witnesses.

The witness summons and expert fees

A question that arises from time to time on the *Register* Helpline is about the effect a witness summons has on what the expert can charge.

The rules regarding the witness summons provide two elements in the payment that summoned witnesses are entitled to receive:

- their **travelling expenses**, and
- **compensation for their loss of time**.

The former is defined as a sum 'reasonably sufficient' to cover the cost of getting to and from the court, which is fair enough. It is the other element that is so provoking to expert witnesses because ultimately it ends up being based on the paultry rates on offer from the Ministry of Justice (MoJ) in its guidance to Crown Court determining officers – guidance that hasn't changed since 2003!

Now in civil cases, when a solicitor causes a witness summons to be issued, it is the solicitor, not the court, who remunerates the witness. If the summons is to be served on an expert who is happy to attend court, but who needs the summons to escape an obligation to be elsewhere, then the case of *Brown*[7] shows that the solicitor should pay the expert whatever was agreed previously between them for the expert's appearance in court.

The solicitor is not obliged to do that, though, if the witness has declined to give evidence for any reason. In this event, the solicitor need observe only the MoJ's guidelines in fixing the amount to be offered. Of course, if it should be less than the minimum they specify, the expert could apply to the court to have the summons set aside. Otherwise the expert has little option but to accept the payment. Refusing to do so does not excuse the expert from obeying the summons.

So the lesson is clear. Unless the expert is seeking to withdraw from a case completely, **indicating an unwillingness to appear in court may simply result in the expert being compelled anyway, and then getting paid a pittance for the privilege!** Please see *Factsheet 43* for a detailed look at the witness summons.

Experts should take care not to become 'unwilling witnesses'

References

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

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

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

[4] *Aktieselskabet de Danske Sukkerfabrikker -v- Bajamar Compania Naviera SA* [1983] 2 *Ll R* 210.

[5] *Society of Lloyd's -v- Clementson (No.2) Times, February 29,* [1996] *(CA) CJQ* 245.

[6] *Adams & Others -v- Allen & Overy & Others* [2013] *EWHC* 4735 *(Ch)*.

[7] *Brown & Another -v- Bennett & Others* [2001] *EWCA Civ* 1352.

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