In confidence?

Chris Pamplin looks at the extent to which an expert witness's evidence might be affected by earlier exposure to information

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Until recently, there was a somewhat dubious authority to suggest that experts were disqualified from acting in contentious cases where they had acted previously for, or had received privileged communications from, the other party.

In *HRH Prince Jefri Bolkiah v KPMG* [1998] EWCA Civ 1563, the analogy was drawn between expert witnesses and solicitors. It was pointed out that a solicitor who has acted for a party is prohibited from subsequently acting against that party on the grounds that he is privy to confidential information concerning that client. In *Bolkiah*, KPMG had provided forensic accountancy services in which they were given access to confidential information concerning the claimant's assets. They had acted in an investigative role and had carried out much work which was similar in nature to that carried out by solicitors in preparation for proceedings. When the claimant became embroiled in unrelated proceedings, experts from KPMG were instructed for the other party. Counsel for Bolkiah, basing his submission on the decision of the Court of Appeal in *Re a Firm of Solicitors* [1992] 1 QB 959, pointed out that:

- a former client is entitled to prevent a firm of solicitors from acting in an adverse situation if there is any real risk (as opposed to a merely fanciful or theoretical risk) of the misuse of confidential information, whether deliberate or inadvertent,
- such a risk exists inevitably where relevant confidential information has been provided to a modern practice, and
- the risk cannot be eliminated satisfactorily by the use of Chinese walls.

He argued that, in the case of forensic work, there was no significant distinction between solicitors and expert accountants. Although it was acknowledged that the retainer was at an end, and it was common ground that accountants owe a duty to their former clients to protect any confidential information they have received from them, the claimant argued that there was a real risk that confidential information would be used or communicated. KPMG had, in this case, agreed with the other party that KPMG experts were expressly released from any duty to disclose confidential information they had admittedly received from the claimant. Counsel for the accountants contended that, consequently, this was not a case where there was any possibility of KPMG being embarrassed by a conflict of duty. In addition, as KPMG had made a formal undertaking not to disclose information about the claimant's financial affairs, obtained in the course of acting for the claimant in the previous litigation, counsel argued that unless the evidence showed there was now a real risk (as opposed to a fanciful risk) that they would not comply with that undertaking, the injunction restraining them from acting should be discharged.

> "There is a fundamental difference between solicitors & expert witnesses"

In the House of Lords, it was the nature of the forensic services provided by the accountants that seems to have been the determining factor in the court's decision. Upon consideration of all the circumstances and the relationship between the parties, Lord Woolf believed that the risk of misuse of confidential information was not merely fanciful. The effectiveness or otherwise of an information barrier was not the only concern, it was also necessary to consider the risk of information being in the minds of staff, partners or anyone else involved. It may not even be consciously in their mind until reminded by some other factor when carrying out their subsequent work. Lord Woolf was not persuaded that where accountants seek to enter into an adversarial role vis a vis a previous client in precisely that area in which they were advising that client, there should be any distinction drawn between them and solicitors. Consequently, KPMG's appeal against the injunction was dismissed.

The decision in *Bolkiah* had effectively provided an authority or the suggestion that all expert witnesses engaged in contentious matters are governed by precisely the same rules of acting as solicitors would be in similar circumstances.

Difference between experts & advocates

However, there is, of course, a fundamental difference between solicitors and expert witnesses. Expert witnesses are not advocates and have a duty to help the court on the matters within their expertise. This duty overrides any obligation to the person from whom they have received instructions or by whom they are paid. Furthermore, Civil Procedure Rules Practice Direction 35.2(1) states that expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation, and similar requirements are contained in the Criminal and Family Procedure Rules. The role of an expert is very different from that of a solicitor, and any suggestion that an expert's freedom to act should be restricted in the same way is questionable.

The issues raised have come before the Court of Appeal recently. In *Meat Corporation of Namibia Ltd v Dawn Meats (UK) Ltd* [2011] *EWHC* 474 (Ch), [2011] All ER (D) 67 (Mar), the High Court considered whether to disallow expert evidence on the basis of the claimant's allegations that the expert had seen privileged and confidential information and, consequently, was not independent.

A claimant sought to engage an expert as a meat industry expert in an agency agreement dispute. When the claimant first contacted the expert in May 2010, the expert was waiting to hear from the defendant with a view to an engagement for them as a consultant. She explained that she would not be able to act as the claimant's expert if she agreed to that role with the defendant. However, she later agreed to consider the request and, at the end of May, received some confidential information from the claimant by e-mail. It was common ground that the e-mail was covered by litigation privilege.

In another e-mail sent by the claimant to the expert, the claimant referred to settlement offers and tactics, based on legal advice given to it. The claimant alleged that in June 2010, the expert agreed to act as the claimant's expert and, thereafter, further details about the case were divulged. The claimant then alleged that the expert changed her mind, claiming diary conflicts and a possible conflict of interest with other activities. The conflict of interest was a reference to the consultancy role for the defendant, with the defendant sponsoring the expert to be a member of an industry association. However, the expert confirmed that she would not divulge any of the communications she had received about the case.

Both parties instructed other experts but, subsequently, the defendant decided to instruct the first expert. This was despite the defendant's knowledge that she had previously been approached by the claimant and had declined to act for them. When the appointment was challenged by the claimant, the defendant's solicitors acknowledged that communications between the expert and the claimants should remain confidential and should not be divulged to the defendant or the court. The expert offered an undertaking to the court on this basis. The claimant also alleged that, in previously acting as consultant for the defendant, the expert's independence was questionable. Accordingly, the two grounds for challenging the appointment were that:

- privileged and confidential information made it untenable for the expert to act as an expert witness for the defendant, and
- the expert lacked the degree of independence necessary for an expert witness.

In Harmony

The Court of Appeal considered the ruling in *Bolkiah* and contrasted this with the court's decision in *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 3 All ER 177, [1979] 1 WLR 1380. In *Harmony*, a handwriting expert had accepted brief instructions to comment on a document. However, not realising that he had already advised on the document, he then gave advice to the other side. He declined to act for either party, but the second party subpoenaed him to give evidence. The Court of Appeal refused to set aside the subpoena, applying the principle that there is no property in a witness, whether an expert or a witness of fact. On the risk of disclosure of privileged information, the court noted many of the communications between the solicitor and expert witness would be protected by legal professional privilege. While there is a tension between the principle of no property in a witness and the receipt of privileged information, the court concluded that the principle still applied.

The Court of Appeal acknowledged that the *Harmony* case was not completely aligned with the facts and issues in *Bolkiah*, but that it did demonstrate that an expert was not automatically disqualified just because he had acted for both sides.

Mann J took the view that the main thrust in *Harmony* was contrary to the *Bolkiah* principles, so far as these concerned expert witnesses. He concluded that *Bolkiah* did not apply merely because privileged information had been given to the expert witness. Mann J further distinguished the issues in *Bolkiah* on the basis that, in that case, KPMG had, in effect, acted like a solicitor and was actually engaged to provide services and obtain information in that context. The information it obtained was likely to be very damaging to the claimant, and the firm's accountants were in the same position as solicitors concerning that information. Accordingly, the House of Lords was not protecting the court–expert witness relationship but was rather protecting a quasi-solicitor–client relationship and the disclosure that went with it.

Independence must be decided on the facts

So far as the independence of an expert witness is concerned, the court applied the principles of *Toth v Jarman* [2006] EWCA Civ 1028, [2006] 4 All ER 1276. Given that the status of an employee did not automatically disqualify a person from acting as an expert witness, a consultant could not automatically be disqualified either. Whether an expert is disqualified for lack of independence will depend on all the facts of the case.

In dismissing the appeal, the court was influenced by the fact that the expert had not actually been engaged by the claimant and that, insofar as she had received privileged or confidential information from them, she had given an undertaking not to reveal it. Mann J made it clear, however, that it was necessary to consider the facts of each case on its merits, and an expert should not be permitted to act where it was likely that the expert would be unable to avoid resorting to privileged information.

> "Whether an expert is disqualified for lack of independence will depend on all of the facts"

It is apparent from the decision in *Dawn Meats* that, despite the earlier decision in *Bolkiah*, expert witnesses are not to be treated in the same way as solicitors and are not automatically disqualified from acting merely because they have received privileged information. It appears, however, that an automatic disqualification may still be applied in circumstances where the expert witness has been engaged in a quasi-solicitor, investigative role.

The case also demonstrates that where confidential or privileged information has been received, it may be sufficient for the expert witness to give an undertaking not to make use of or reveal that information. It seems likely that the court would accept the efficacy of such an undertaking, save where it takes the view that the nature of the information is such that the expert witness would be unable to avoid the use or influence of that information. NLJ

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