A civil report in the dock

Chris Pamplin looks at the issues that can arise when a report written in contemplation of civil proceedings gets drawn into criminal proceedings

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Is an expert witness obliged to hand over to the Crown Prosecution Service (CPS) a report he had prepared for use in earlier civil proceedings? This was the question raised by an expert witness listed in the *UK Register of Expert Witnesses* recently. This article not only touches on the status of the report itself, but also on issues about the direct application of the contents of the civil report to the matters at issue in any criminal proceedings, and whether the expert was entitled to qualify some of the points contained in the original report.

Who owns the report?

It is usual for an expert report to belong to the party who paid for it, a position controlled by the expert's contract. In the majority of cases this will be the original instructing solicitor, or his client. But, regardless of who holds the copyright, the report's use in court proceedings will *not* breach that copyright.

If it is just a copy of the report that is required, and there is no intention to call the expert as a witness (whether as an expert witness or witness of fact), there are existing procedures in place to obtain copies of the report without necessarily involving the expert. So far as expert reports on the court file are concerned, the position is governed by Civil Procedure Rule 5.4C(2) which states: "A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

What can the documents be used for?

The requirement for permission is a "safety valve" intended to allow access only to documents that should be provided in legitimate circumstances. There is no unfettered right of access to the court file other than in accordance with the court rules and practice directions.

It has always been necessary to identify the documents, or class of documents, for which permission is sought and the grounds relied upon. The main reason for this given by the courts has always been that access to court files is one of the principles of open justice and that it is necessary to monitor that justice is done, particularly as it takes place.

However, the principal has been extended over the years to cover some requests which, on the face of it, have nothing at all to do with open justice, e.g. applications that were obviously commercial or were simply seeking out *potentially* useful information in respect of, for example, collateral litigation or investigative journalism.

In *Cooperative Group Ltd v John Allen Associates Ltd* [2010] EWHC 2300 (TCC) the judge stated that there was no particular requirement for the court to give permission for a party to use an expert report disclosed by another party, or a non-party, as evidence at trial and, on the face of it, they should be free to do so. However, the fact that the experts themselves could not be cross-examined would mean that the weight given to such evidence would be "much less" than expert evidence supported in oral evidence.

The judge also made it clear that the party wishing to rely on the report could not cherry pick. Once a report was relied on in evidence, the court must take account of the whole of that report, so far as it was relevant, and a party could not choose which parts of the report should be given in evidence.

It would appear, then, that lawyers acting for either the prosecution or defence in criminal proceedings might legitimately seek a copy of an expert report from the files of the civil courts, and that such a request is likely to be granted.

Requests to the expert to produce copies

Assuming that the CPS lawyer (or whoever) does not seek to obtain a copy of the expert's report by direct application to the civil court, is the expert obliged to voluntarily produce a copy on request? Assuming, for the moment, that the expert is merely requested to produce the document, and is not being called as an expert witness, the simple answer is "No!" There is no general obligation to produce a document or attend court unless a summons has been obtained and served. Until a summons is in place, the court has no power to make any order relating to the production of the document or the attendance of a witness.

Witness summons

An expert who might be reluctant to comply with a voluntary request, for whatever reason, may require the requesting party to first make application to the court. Furthermore, the expert may have no mechanism for formally challenging the validity of the request or the relevance of the requested document without an application for a witness summons being made.

The issuing of a summons is governed by s 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (CP(AW)A 1965) (see box overleaf) which sets as the key to any application the issue of *materiality*. The summons can only be issued in relation to the production of such documents as will be material and of demonstrable evidential value in the proceedings. Unlike when requesting reports from court, it is not enough to satisfy the court that these *may* offer up legitimate lines of inquiry. The document to be produced must have a direct bearing upon the issues in the proceedings and speculation should have no place in the process.

The summons must be sufficiently detailed to indicate what material the person is likely to provide, and it is good practice to explain in some detail why the material is of relevance to the proceedings. The summons should not simply ask for a plethora of items, but should identify what is relevant and why.

There is nothing inherently wrong with

a witness (whether expert or not) requiring a summons to be issued, and the court will not automatically take an adverse view of a witness who does not wish to attend or produce documents voluntarily. Sometimes, for example, a witness will not be able to take time off work without a formal summons being issued. Alternatively, as in this case, the summons procedure may be the only opportunity the expert may have to explain to the court why he thinks the report, in whole or in part, is not material or relevant in the criminal proceedings, or why it may need to be qualified in certain respects.

Once a summons is granted and issued, the person upon whom it is served must attend at the location, date and time specified in the summons. Where documents, or other objects, are required, these must also be identified within the summons. The rules governing the challenging of a summons are contained in Civil Procedure Rule Pt 28.

Compellability

The above considers the position where there has been a request merely for the production of a document. But what if the prosecutor also sought to call the expert as a witness?

The position is rather different depending on whether attendance is required as a witness of fact or as an expert witness. English courts will generally oblige a witness of fact to testify to a fact in issue. They will not, as a rule, require an expert to give expert evidence against his wishes in a case where he has had no connection with the facts or the history of the matter in issue (*Seyfang v Searle & Co* [1973] *QB* 148, [1973] 1 All ER 290). This was accepted as laying down a general principle in *Lively Ltd v City of Munich* [1976] 3 All ER 851, [1976] 1 WLR 1004 when Kerr J said: "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."

Both cases were followed in *Harmony Shipping Co SA v Davis* [1979] 3 All ER 177, [1979] 1 WLR 1380, although Lord Denning alone took the view that an expert should be in the same position as a witness of fact and that the court was entitled to have his evidence, except for any matter protected by legal professional privilege.

In *Society of Lloyd's v Clementson (No 2)* [1996] CLR 1205, (1996) *Times*, 29 February, the Court of Appeal held that the court has discretion to decide whether to compel an expert to appear against his wishes. The discretion is fairly broad, and the court will take account of the following:

- that a court is, on the face of it, entitled to every man's evidence, whether of fact or opinion;
- whether the expert has some connection with the case in question;
- whether he is willing to attend, provided that his image is protected by the issue of a [summons];
- whether attendance at court will disrupt or impede other important work he has to do, and
- whether another expert of equal calibre is available.

Conclusions

In conclusion, the expert was not obliged to voluntarily produce a copy of his report, although he could probably not have prevented a copy being obtained from the court file by direct application. If he wished to oppose production, or to qualify the relevance of the document or its validity in the criminal proceedings, he could ask that a witness summons be obtained and then set out any objections. An expert's concerns can include specific comments in relation to the contents and intended use, as well as any broader grounds for objection, such as confidentiality, privilege or public policy.

If he had been called as a witness of fact, he would likely have been compellable. The issue of compellability would have been much less certain if he'd been called as an expert witness. NLJ

CP(AW)A 1965, s 2

(1) This section applies where the Crown Court is satisfied that –

(a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and

(b) the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing.

(2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to –

(a) attend before the Crown Court at the time and place stated in the summons, and

(b) give the evidence or produce the document or thing.

(3) A witness summons may only be issued under this section on an application; and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

(4) Where a person has been committed for trial [or sent for trial under section 51 of the Crime and Disorder Act 1998] for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after the committal.

(5) Where the proceedings concerned have been transferred to the Crown Court, an application must be made as soon as is reasonably practicable after the transfer.

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