

# Admitting late expert evidence

Dr Chris Pamplin finds courts are less draconian on delays in evidence where parties are not at fault



## IN BRIEF

► Although the courts continue to take a dim view of delay in presenting expert evidence, there can be exceptions when the admission of the evidence is practical, relevant and proportionate.

Admitting expert evidence very late in the day is a fraught business. In *Shetty v Pennine Acute Hospitals NHS Trust* [2014] 2 WLUK 970, the court ruled on appeal against a refusal to allow permission to rely on the evidence of an additional expert witness, even though the evidence was served ten months after expiry of the court's time limit.

### If there is no fault in the delay

The Court of Appeal was mindful that the witness statement was ten months late. Indeed, in the light of the amended Civil Procedure Rule 3.9, there was pressure to disallow such late evidence. However, it was necessary to determine whether the party seeking to adduce the late evidence was at fault. In this case, the evidence concerned a factual issue which had arisen at the secondary stage of the gathering of expert evidence, and it fell squarely within the exceptions identified by the court in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 2 All ER 430. In such circumstances, even assuming there had been a default, there was a good reason for the delay and relief should be granted.

The Court of Appeal concluded that where the late evidence arose out of 'later developments', and the admission of the evidence was practical, relevant and proportionate (and presumably that the adducing party had not been guilty of some fault that led to, or exacerbated, the delay), there was no undermining of the strict approach to timetables. Thus, the new evidence should be allowed.

### If new matters aren't being raised

The principles to be applied by the judge in allowing or refusing such evidence came before the court once again recently in

*Lucinda Sanford Ltd v Russell* [2021] 4 WLUK 273. The case involved a building dispute. The claimant had been contracted as a builder in the defendant's home refurbishment, and had also acted as project manager and designer. Work commenced in 2015 but ceased in 2018 before the work had been completed. The claimant brought a claim for the money due under the contract, and the defendant counterclaimed for alleged delay, failure to complete the work on time and resulting remedial costs.

There were five separate experts in the case, all of whom were required to report on separate disciplines. A Scott schedule had been prepared and updated, and a trial date had been set. Directions had been given imposing a timetable for joint statements and expert reports to be served. It should be noted that, by the time the experts were instructed, the remedial and completion works had already been undertaken, so that it was not possible for the alleged defective works to be seen *in situ*.

One of the defendant's experts was a building surveyor who had been involved in the refurbishment from 2017. He had produced a witness statement with a number of photographs of the works, including the roof. However, after the deadline for reports had expired, the surveyor came forward with an additional 4,000 photographs, as well as a supplemental statement dealing mostly with alleged defects in the roof and cornicing which made reference to some of the photographs. The claimant objected to both disclosure of the photographs and the supplemental statement.

There was no question that the photographs and supplemental statement were useful and relevant, particularly because it was no longer possible to inspect the original work. To this extent, the evidence probably fell within the parameters identified in *Shetty*. However, the defendant and the expert were unable to supply any reasonable explanation as to why the defendant had not obtained all 4,000 photographs from the expert at the date of the first report. Consequently, there was doubt about whether the defendant could fairly be

said to be without fault.

The view taken by the court was a pragmatic one. Although the proceedings were well advanced, and the claimant's legal team was already well ahead on preparing reports and joint statements for a tight trial timetable, there was no suggestion that the defendant was seeking to adduce evidence on 'new matters'. The court noted that the issues regarding the roof had been identified in the Scott schedule and agreed by the claimant. Accordingly, the court was able to say that the supplemental report did not contain any new allegations, merely new evidence in relation to an existing report. The expert had simply described the alleged defects in more detail by reference to the photographs.

The lack of explanation for the delay in producing the photographs was a troubling one, but the court was persuaded that the overall justice of the case should lead them to permit the surveyor expert's supplemental witness statement and the photographs to which it referred. The court believed that, although late, the exercise of the claimant's expert witnesses looking at the roofing photographs contained in the supplemental disclosure should be relatively straightforward and not cause the trial to be delayed.

However, so far as the remainder of the 4,000 photographs was concerned, although useful, they had arrived too late. There were too many to study and there was insufficient time for this to be done without prejudice to the claimant.

### A less draconian approach?

Although the courts continue to take a fairly dim view of delay in presenting expert evidence, things have come quite a long way since the draconian stance frequently taken in the aftermath of the civil justice reforms. Those that saw this as somewhat despotic and repressive will no doubt recognise a small victory for the cause of natural justice.

NLJ

Dr Chris Pamplin is the editor of the *UK Register of Expert Witnesses* and can be contacted on [nlj@jpspubs.com](mailto:nlj@jpspubs.com). Website: [www.jpspubs.com](http://www.jpspubs.com).