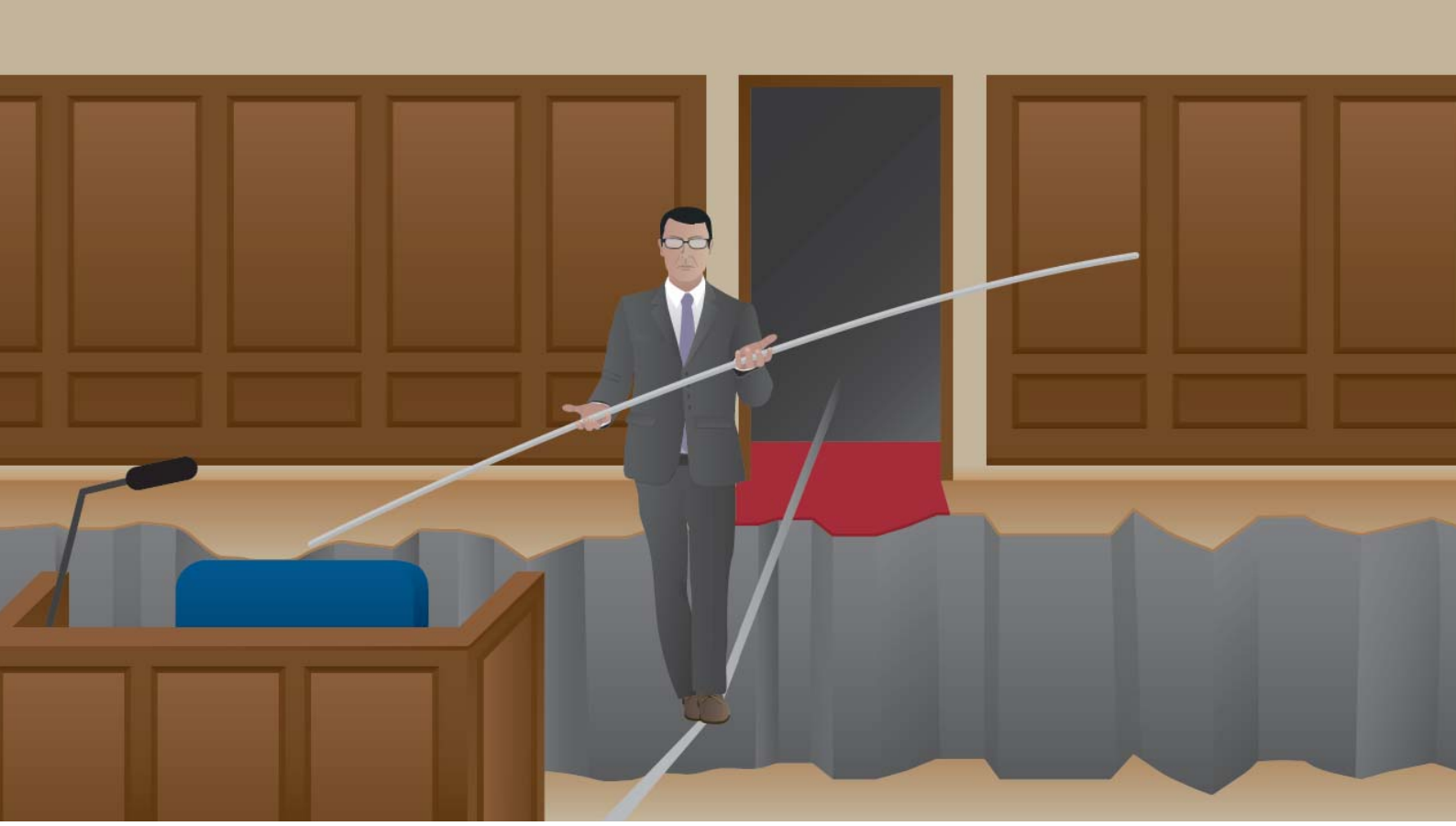

EXPERT EVIDENCE
WALKING THE LINE OF DUTY

John Sykes and Simon Heatley of Charles Russell Speechlys LLP examine the increasingly complex subject of expert evidence.

A range of cases may present the need for expert evidence, from disputes concerning information technology, construction, intellectual property and shipping, to professional negligence claims. However, parties should not assume that the court will automatically permit expert evidence in technical cases. In *JP Morgan Chase Bank v Springwell Navigation Corporation*, the High Court emphasised that it is the court's duty to reject firmly all expert evidence that is not reasonably required to resolve the proceedings (*[2008] EWHC 1186, see Briefing "Lessons from Springwell: when exotic became chaotic", www.practicallaw.com/2-383-1305*)

The courts exert a tight grip on expert evidence and the line of duty can be something of a tightrope for practitioners and experts alike. This article looks at the increasingly complex subject of expert evidence, from considering the use of expert advisers and single joint experts, to questions of disclosure, privilege and hot-tubbing.

THE NECESSITY TEST

Civil Procedure Rule (CPR) 35.1, which governs expert evidence, provides that evidence will be restricted to that which is reasonably required to resolve the proceedings.

In *British Airways plc v Spencer and others (present trustees of the Airways pension scheme)*, the High Court took the opportunity to set out its understanding of the assessment required of the court under CPR 35.1 (*[2015] EWHC 2477, www.practicallaw.com/5-618-8507*). The court should look at the pleaded issues and consider the following:

- Whether expert evidence is necessary to resolve each issue. If evidence is necessary, and not just helpful, it must be admitted.
- If expert evidence is not necessary, whether it would assist the court in resolving the issue. If expert evidence would assist but is not necessary, the court should be able to determine the issue without it.
- If expert evidence is not necessary, whether it is reasonably required to resolve the proceedings, taking account of factors such as the value of the claim, the likely impact of the judgment and who will bear the costs of the expert evidence. If expert evidence is reasonably required, the court may allow it.

The Supreme Court approved this necessity test in relation to opinion evidence in *Kennedy v Cordia (Services) LLP*, saying that the issue under discussion must be necessary for the proper resolution of the dispute and be such that a judge or jury would be unable to reach a sound conclusion without the assistance of an expert witness (*[2016] UKSC 6*). However, the court cautioned that the test as to the admissibility of skilled evidence of fact

cannot be that of strict necessity, as the efficient determination of the case must also be considered. For example, a party might be able to determine a fact in issue by calling many factual witnesses at great expense, which would mean that a strict necessity test would not be met. The court concluded that if skilled evidence of fact would be likely to assist the efficient determination, the court should admit it. While *Kennedy* concerned a Scottish appeal, it is still persuasive guidance.

What this means at a practical level will vary from case to case. The court has to balance how likely the evidence is to assist alongside how strongly it will assist. In *British Airways*, the court was quick to recognise that the helpfulness of expert evidence may not be clear at the case management stage and that the trial judge ultimately has the power to control evidence.

In *Darby Properties Ltd v Lloyds Bank Plc*, the High Court pulled together various strands of case law to set out some commonly accepted principles about the admissibility of expert evidence (*[2016] EWHC 2494 (Ch)*). In addition to those cited in *British Airways*, these principles include that:

- Expert evidence is admissible in any case where the court accepts that there exists a recognised expertise, governed by recognised standards and rules of conduct, that is capable of influencing the court's decision on any of the issues that it has to decide and the witness has a sufficient familiarity with, and knowledge of, the expertise in question.

- If there is no recognised body of expertise governed by recognised standards and rules of conduct relevant to the issue on which the court must decide, the court should not admit evidence that is the subjective opinion of the intended witness rather than the evidence of any body of expertise. The High Court emphasised this point in *Vilca and others v Xstrata Ltd and another*, where it held that it would be unlikely to permit expert evidence where there is no objectively ascertainable standard or consensus against which to judge the defendants' behaviour (*[2017] EWHC 1582 (QB)*).

A recent example that did not pass the necessity test was *Carr and others v Formation Group Plc and others* (*[2018] EWHC 3116 (Ch)*). The 17 individual claimants alleged dishonesty and unlawful means conspiracy against the defendant sports agents and financial adviser. The High Court refused the claimants permission to submit expert evidence in respect of the dishonesty allegations. The court held that, as the test for dishonesty here was an objective standard, expert evidence of market practice was unnecessary. The court could assess the appropriate objective standard by the standards of honest and reasonable people: it is the court, not market practice, that sets the standard of honesty. However, the court did allow the parties to call expert evidence on market practice regarding the payment of undisclosed commission, as this was relevant to an element of the defence which relied on subjective belief as to whether certain conduct was lawful and market practice was pertinent to this.

EXPERT ADVICE

When the court will permit expert evidence to be submitted in the proceedings and when a party may require the assistance of an expert may not be one and the same. In some circumstances it would be disadvantageous for a party to wait until the court has given directions or permission for expert evidence in relation to a specific field of expertise or certain issues. For example, early engagement with an expert allows a party to determine the strength of a case and the potential sums at stake. By contrast, approaching an expert late on, when considerable time and cost has been invested in what the expert says is a weak case, is clearly unattractive.

The need to obtain permission from the court under CPR 35 is only engaged in circumstances where a person is instructed to give or prepare expert evidence for the purpose of proceedings. An expert may be instructed privately to advise a party, for example, in the formulation of its claim or defence on a specialist or technical matter that is within the expert's expertise. In these circumstances, the formal duties to the court do not apply, nor is permission required.

The early appointment of an expert adviser can assist a party in identifying the real issues in dispute, what may require investigating and the technical merits of a case. However, potential parties to litigation should consider the following issues:

- The costs incurred in appointing an expert adviser may not be recoverable from the other party, particularly if another person is subsequently appointed as an expert witness under CPR 35.

- There may be a desire to appoint the adviser as an expert witness. This will require careful consideration. The obvious challenge by an opponent, or the court, will be as to the expert's independence, given their earlier involvement. If their independence is perceived to be impaired, there is a risk that it will not be possible to use the expert adviser as an expert witness.

- The original instructions to an expert adviser who is subsequently appointed as an expert witness will usually be privileged from disclosure to the other party (*see "Privilege" below*). However, to ensure that these instructions will not be disclosable, the letter of retainer should make it clear that the expert adviser is not being instructed to prepare expert evidence for the purpose of proceedings and new instructions should be provided to the expert in their role as a court-appointed expert witness.

EXPERT EVIDENCE IN PROCEEDINGS

When it comes to instructing a person to give or prepare expert evidence for the purpose of proceedings, rather than in a purely advisory capacity, CPR 35 will be engaged. There are a number of points to note:

- A party may not call an expert or put in evidence an expert's report without the court's permission (*CPR 35.4(1)*).

- The expert has an overriding duty to the court, which overrides any obligation to their instructing party.

- Guidance on what that overriding duty entails is set out in Practice Direction (PD) 35 and was summarised by the High Court in *National Justice Compania Naviera SA v Prudential Assurance Company Ltd (Ikarian Reefer)* (*[1993] 2 Lloyd's Rep 68*) (*see box "The Ikarian Reefer duties"*). Among other things, an expert's evidence should be independent, transparent and objective, and be uninfluenced by the pressures of litigation (*paragraph 2.1, PD 35*).

- An expert witness is permitted to give opinion evidence, unlike a factual witness.

- There is a presumption that the expert's evidence will be given in the form of a written report but this does not preclude a party from seeking permission for the expert evidence also to be given orally (*CPR 35.5*).

- When seeking permission to submit expert evidence, the expert should be named "where practicable" (*CPR 35.4(2)(b)*). The directions questionnaire makes a similar request. However, neither obliges a party to name an expert. Refraining from doing so will allow greater flexibility. For example, where a party has been given permission to rely on the report of an unnamed expert in a specified field, if it were to seek to replace its first expert with a second one, the court's permission to instruct the second expert would not be needed and the court cannot require the disclosure of the first report as a condition of allowing a second, replacement report.

- The material instructions to an expert witness are not privileged (*see "Privilege" below*). The expert must state these in their report, whether the instructions are written or oral. The objective behind this is to promote transparency in the process of instructing an expert and to prevent so-called "expert shopping". The expert must include a complete and accurate statement otherwise the opposing party may be able to apply for the disclosure of, or cross-examination in relation to, the instructions.

Single joint experts

Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue be given by a single joint expert (*CPR 35.7(1)*). The court may exercise this discretion even without the agreement of the parties. Either way, the court will take into account all of the circumstances, including the proportionality of having separate experts for each party and whether the evidence falls within a substantially established area of knowledge that is unlikely to be in dispute or there is unlikely to be a range of expert opinion (*paragraph 7, PD 35*). This echoes the sentiments of Lord Woolf's 1996 Access to Justice report, which first suggested the use of single joint experts (*https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm*).

It is common, particularly in high-value multi-track cases, for parties to instruct their own experts. However, there may be circumstances where it is appropriate for a single joint expert to be instructed. In the Chancery Division, for example, single joint experts are commonly used on questions of quantum, such as the valuation of property, where that question is not the central issue. However, where liability is likely to turn on expert evidence or where quantum is a primary issue, the Chancery Guide acknowledges that it will generally be more appropriate for the parties to instruct their own experts (*paragraph 17.49*).

Opinions on the value of single joint experts vary. There can be advantages in suitable cases: it is usually cheaper and quicker and, given there is only one view expressed, the report can often be determinative and lead to settlement. On the other hand, there is not the opportunity to test the expert's views without the involvement of the other parties, the courts are often reluctant to order a single joint expert to attend trial for questioning and the party will be fettered in its choice of expert.

In practical terms, where a single joint expert is appointed, parties should attempt to devise a protocol covering all aspects of the appointment including, as a minimum:

- The terms of reference.

- The procedure for the expert to seek further information, documents and instructions.

- The payment of fees.

Judicial expectations

Beyond the duties and responsibilities of an expert witness set out in CPR 35 and PD 35, as well as in the pre-action protocols and in court guides, it is helpful to note what the judiciary expects:

The Ikarian Reefer duties

The High Court in *National Justice Compania Naviera SA v Prudential Assurance Company Ltd (Ikarian Reefer)* set out the following duties and responsibilities that apply to expert witnesses in civil cases:

- Expert evidence should be the independent product of the expert, uninfluenced by the pressures of litigation.

- An expert witness should provide the court with their objective, unbiased opinion in relation to matters within their expertise; they should never assume the role of an advocate.

- An expert witness should state the facts or assumptions on which their opinion is based, and should not omit material facts that could detract from their concluded opinion.

- An expert witness should make it clear when a question or issue falls outside their expertise.

- Where there is insufficient data for an expert to provide a properly researched conclusion, they should indicate that their opinion is provisional.

- If an expert changes their view on a material issue after the exchange of reports, this should be communicated to the opposing party without delay and, if appropriate, to the court.

- Where expert evidence refers to documents such as photographs, plans or calculations, those documents must be provided to the opposing party on the exchange of reports (*[1993] 2 Lloyd's Rep 68*).

Getting it wrong

Selecting an unsuitable expert witness can be damaging for a party's case, resulting in evidence that may be disregarded and even indemnity costs orders. Case law is strewn with cautionary tales.

In *Hirtenstein and another v Hill Dickinson LLP*, the claimants sued their solicitors for professional negligence in handling the purchase of a yacht. The High Court was unable to place reliance on the valuations of the yacht provided by the claimants' expert or attach any credence at all to the repair figures that the expert had "rubber-stamped" (*[2014] EWHC 2711 (Comm)*). The court found that the expert's evidence was "something of a moving target" and, more critically still, that there was no explanation that exonerated him of incompetence and that he was not a fit person to act as an expert witness.

In *Van Oord UK Ltd and another v Allseas UK Ltd*, the High Court held that the claimants' quantum expert evidence was entirely worthless and disregarded it in full (*[2015] EWHC 3074 (TCC)*). During cross-examination, the expert admitted that there were widespread and important elements of the claim that he could no longer support. This was the first time that he had acted as an expert. The court concluded that the expert had allowed himself to be used as the claimants' "mouthpiece". This meant that he was not independent and his evaluations were neither appropriate nor reliable.

In *Siegel v Pummell*, the High Court ordered Mr Pummell to pay some of the costs of Mr Siegel's successful claim on the indemnity basis because of the manner in which Mr Pummell's expert witness had prepared and given his evidence (*[2015] EWHC 195 (QB)*). The expert was held to have been combative and dismissive of other professionals in his evidence, and there were serious shortcomings in the way that he approached the giving of his evidence. This took his conduct so far out of the norm that it justified an order for indemnity costs.

Clarity. This was the cornerstone of Lord Justice McFarlane's keynote address to the Bond Solon Experts Conference in November 2018 (2018 keynote address), who said that his advice to experts could be reduced succinctly to one single word: clarity (*www.judiciary.uk/wp-content/uploads/2018/11/pfd-speech-bond-solon-experts-conference-2018.pdf*). He explained that the concept includes clarity of thought and clarity of explanation. In regard to clarity of thought, he said that expert reports are likely to be much more valuable if experts spend time in "reconnaissance" before committing a single word to paper. In regard to clarity of explanation, he said that every expert's aim should be to explain their opinion clearly to lay people, using succinctly worded, clear and short paragraphs.

Impartiality and independence. Mr Justice Akenhead emphasised impartiality and independence when writing for the Academy of Experts journal, "The Expert & Dispute Resolver", in March 2013. In his view, an expert's independence is a key issue for the court. He referred to the *Ikarian Reefer* duties, noting that they still hold strong today. He suggested that judges are good at spotting an expert who is a "hired gun" and cautioned against using an expert who asked those instructing them what they should say.

A willingness to concede. It is important to be willing to concede and to avoid being too dogmatic or, as Lady Justice Rafferty expressed it in her keynote presentation to the November 2017 Expert Witness Conference (2017 keynote presentation): "try to leave your hackles at home" (*www.bondsolon.com/lady-justice-raffertys-keynote-presentation/*). An expert who adheres to these attitudes will be much more impressive and valuable than one who simply toes the party line or holds unflinchingly to one particular theory.

Relevant expertise. As Mr Justice Akenhead highlighted, it is self-evident that the parties should call experts who actually know and are experienced in what they are talking about. An expert who is a generalist or who is out of date because they are no longer practising will be a problem for the court.

CHOOSING AN EXPERT

Finding and retaining the right expert who is capable of meeting not only their duties under the rules, but also the expectations of the court, is likely to be key to the success of a party's case (*see box "Getting it wrong"*). While a party may think that it has identified the stand-out individual, if that person does not have the time that is needed to devote to the case, they may not be the right expert to instruct. On the other hand, if the expert has plenty of time and assures the party that they have the expertise, yet their CV indicates that their experience dates back some years, that party will need to assess whether it will need someone with more up-to-date experience (*see box "Checklist for appointing an expert"*).

Timing is also critical: there could be a limited pool of experts, some of whom may already be conflicted out. Unless quick action is taken, the opposing party may have already selected the "best" expert.

In terms of first steps, obtaining recommendations will be one of the most effective ways to identify a suitable expert. The recommendations may come from colleagues and counsel but also from the client, which is likely to have a detailed knowledge of its business sector and of who stands out in that sector (or does not), and potential conflicts of interest. Alternatively, there are a number of commercial providers of experts in particular industries.

The care required when making enquiries as to the possible instruction of an expert witness was demonstrated recently in *Bridgestone Licensing Services Inc and Bridgestone Americas Inc v Republic of Panama* (*ICSID Case No ARB/16/34*). The Bridgestone companies had spoken to an expert with a view to instructing him to act as their expert witness. The expert was subsequently instructed by the Republic of Panama. Bridgestone applied to the arbitration tribunal to remove the expert witness, arguing that there was a conflict of interest. The arbitration tribunal denied the application. This decision suggests that a potential expert witness will not be bound by any duty of confidentiality unless

the party expressly stipulates that their communications are confidential.

INSTRUCTING AN EXPERT

The process for instructing an expert under CPR 35 is two-fold: practitioners should prepare a retainer letter and a letter of instruction.

The retainer letter should set out the terms of engagement with the expert, including fees, confidentiality and an express acknowledgment that the expert has no conflict of interest. If the expert asks to use their own terms, practitioners should check carefully that these cover all relevant points. Practitioners should also be aware of any indemnities, exclusions or limitations of liability that are included in the expert's terms and consider whether they are prepared to accept these.

The letter of instruction is the formal instruction to the expert. It will need to set out the background to the case and specific matters to be considered in the report, which may often be presented in the form of questions. It should also set out any key timings in the case management timetable, if one has been set, and enclose any necessary documents or information. These are likely to include the statements of case, relevant disclosure documents and final signed witness statements. Practitioners should take care not to provide draft witness statements or other privileged documents since there is a risk that these may have to be disclosed (*see "Privilege" below*).

The reason for the two-fold approach is because instructions to an expert are disclosable, whereas the retainer letter is less likely to be (*see "Expert advice" above*). It follows that the letter of instruction should not include any comments about the merits or strategy of the case.

It is important to ensure that the expert is referred to all relevant parts of CPR 35 and PD 35 regarding their duties and responsibilities, and the requirements with regard to their evidence. It may be prudent to enclose a copy of the rules and any relevant sections of an applicable court guide, along with the Civil Justice Council's 2014 guidance for the instruction of experts in civil claims (CJC guidance) (*www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf*).

Checklist for appointing an expert

Once a party has identified a potential candidate, the legal practitioners should find out as much as possible about their suitability for the role. A sensible checklist would be as follows:

- ✓ Does the individual have the requisite level of expertise and practical experience of the subject? Practitioners should obtain their CV and ensure that their scope of knowledge is not limited to a specific area but encompasses a general understanding of the topic.
- ✓ How current is their experience? It may be preferable to instruct somebody still working in the relevant area to ensure that they are up to date with any recent developments. As Lady Justice Rafferty put it in her November 2017 keynote presentation to the November 2017 Expert Witness Conference: "courts warm to the expert who is still practising."
- ✓ Have they previously given evidence? Ideally, the individual will have experience of appearing in court as an expert witness and of dealing with cross-examination. Even the most accomplished expert may be intimidated by the courtroom and giving oral evidence if it is their first time. However, the court will spot a "professional expert" with no practical experience of the subject.
- ✓ Can they think well on their feet? The court has the ability to order the concurrent giving of expert evidence, which will suit experts who are able to do this (*see "At trial" in the main text*).
- ✓ Does the expert have time to spend on the matter? It is important that the expert is willing and able to commit the necessary time and resources to the matter and be relied on to meet deadlines. The court will often fix the trial date at the case management conference, so it is best to be armed with information on the expert's availability by this time if possible.
- ✓ Will the expert be working alone or be assisted by a team? The latter may be helpful but the expert needs to be sufficiently involved to state that they have authored the report and have the personal expertise to speak to it.

Practitioners should avoid giving instructions that are too narrow; the expert needs to consider all relevant information. A badly briefed or supported expert may ultimately not help the case at all. For example, in *Weatherford Global Products Ltd v Hydropath Holdings Ltd and others*, one of the experts failed to identify in his report all of the documents and information that he had clearly been provided with and relied on, and another expert had been inadequately briefed and not shown certain documents (*[2014] EWHC 2725 (TCC)*). This damaged the reliability that the High Court attributed to each expert.

THE EXPERT REPORT

The requirements for the form and content of the report are set out in CPR 35.10 and PD 35.3. Paragraphs 48 to 60 of the CJC guidance should also be taken into account. In summary:

- The report must be addressed to the court, not the parties.
- The report should use first person pronouns.
- The report should set out the expert's qualifications and, where specialised expertise is called for, how the expert is qualified to provide that.
- The expert must set out all material on which they have relied in making the report and the factual basis for the report.
- Where there is a range of opinion on an issue, the expert should summarise this and give reasons for their opinion.

Courts will be alive to the fact that apparent differences in experts' opinions may be derived from differences in the instructions given, and may not actually evidence genuine issues in dispute.

- The expert should make it clear if their opinion is provisional or qualified in any way.

- The report must summarise their conclusions.

Factual evidence may be included, as the Supreme Court in *Kennedy* noted, where it will likely assist the efficient determination of a case (*see "The necessity test" above*). The test in this regard is not one of strict necessity, unlike opinion evidence. However, findings of fact are for the court, not the expert, to make.

In his 2018 keynote address, Lord Justice McFarlane noted that it is not unusual to encounter an expert report where the initial section runs for many pages in which the primary evidence is simply regurgitated in a manner that seems, at that stage, to afford each element of it an identical value (*see "Judicial expectations" above*). It is, as he put it, "a landscape without contours"; it is only later on that the reader can discern what the expert considers to be important and at the very end that the expert's opinion is finally stated. Lord Justice McFarlane provided some practical tips:

- Less is more. Succinctly worded but clear, short paragraphs are more valuable than densely written discursive text.

- A sensible size font, good spacing and clear open presentation in the report is something that judges as readers will cherish.

- A paragraph or two setting out the basic science applicable to the point in question is "worth its weight in gold". So too can be the use of photographs, diagrams or other images.

- Expert witnesses must show their working out. They should outline the basis for their opinions and conclusions, and the information and analysis on which they rely.

It is important to work closely with the expert on the report and not simply assume that they have done the job. Practitioners should review the draft report, keeping in mind that their comments may become disclosable (*see "Privilege" below*). If any aspect of the report is unclear, this should be checked with the expert, along with their reasons for reaching a particular conclusion. If practitioners are in any doubt, they can expect the court to be as well. In addition, it is important to ensure that the report aligns with the pleaded case. It is acceptable to seek amendments to the report in relation to factual accuracy and procedural compliance but not, of course, amendments that might distort the expert's opinion.

If practitioners receive a report from the opposing party that contains potentially inadmissible content, it is worth bearing in mind the recent case of *A v B*, where the High Court made it clear that it will not embark on an editing exercise in advance of trial (*[2019] EWHC 275 (Comm)*). The court emphasised that the proper course is for the whole document to be before the court and for the trial judge to take account of the report only to the extent that it reflects expertise and to disregard it insofar as it does not. However, this does not prevent practitioners from putting a marker down in correspondence and explaining that the issue will be raised at trial.

PRIVILEGE

An expert adviser's advice and any reports are privileged and should therefore remain outside the ambit of a conditional order for disclosure. This was confirmed in *Jackson v Marley Davenport Ltd*, where the Court of Appeal held that, when an expert adviser is subsequently instructed as a court expert, their advising reports remain privileged unless the privilege is expressly waived (*[2004] EWCA Civ 1225*).

Instructions

When it comes to instructing an expert under CPR 35, those instructions will not be privileged. However, the court will only order the disclosure of a specific document or permit questioning in court (other than by the instructing party) if it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete (*CPR 35.10(4)*). It is therefore important to ensure that the instructions to the expert are accurate and complete and are set out in the expert's report.

Draft reports

The CPR are silent on whether the draft of an expert's report is privileged. However, in *Jackson*, the Court of Appeal held that the reference in CPR 35.10 to an expert's report must be a reference only to the expert's intended evidence, and not to earlier and privileged drafts of what may or may not become the expert's evidence. The main exception to this is where a party wishes to substitute a named expert. If an expert is named in the order permitting expert evidence to be submitted, and the instructing party later wishes to substitute that expert, the first expert's report, whether in draft or final form, will usually have to be disclosed as a condition of granting permission to change experts.

For example, in *Allen Tod Architecture Ltd v Capita Property and Infrastructure Ltd*, Allen Tod lost confidence in its original expert after delays in the production of his report (*[2016] EWHC 2171 (TCC)*). The court permitted Allen Tod to change experts but on condition that it disclosed any report or document setting out that expert's opinion, whether in draft or final form. Even though this was not a case of expert shopping, the fact that any of the documents sought to be disclosed might be privileged was not a reason to prevent their disclosure as part of the price that Allen Tod had to pay in order to call the new expert.

By contrast, in *Vilca*, the High Court rejected the claimants' argument that the disclosure of the previous expert's report should be a condition of allowing the defendants to rely on a new expert. The original expert, who had not been named in the original order for permission, had withdrawn due to ill health and so the defendants sought to rely on the evidence of a second expert. The court considered that the disclosure of a prior report would be a hindrance: the fact that the first expert's report was only in draft meant that if a conditional disclosure order were made, there might be distracting and expensive argument about whether parts of the report represented the expert's final, considered view.

Related documents

Practitioners should not forget that documents referred to in the expert's report will be subject to the provisions of CPR 31.14; that is, the general rule that a document mentioned in a witness statement can be inspected. A party may apply for an order

for inspection of those documents if they have not already been disclosed in the proceedings. However, a distinction may be drawn between documents cited by the expert and documents provided to the expert as part of their instructions, which may benefit from the limited protection under CPR 35.10(4).

DISCUSSIONS BEFORE TRIAL

It is common for the service of experts' reports to be followed by discussion and a meeting, or meetings, between the experts that does not involve the lawyers or their clients, and the production of a joint statement for the court. The process is not obligatory but the court has the discretion to direct it to happen.

The purpose of the discussions is for the expert witnesses to agree and narrow issues and, in particular, to identify the extent of the agreement between them and the points of any disagreement. The experts' discussions are without prejudice and therefore cannot be referred to at trial unless the parties agree. The product of these discussions or meetings is usually a signed joint statement dealing with the areas of agreement and disagreement. Again, the statement is not obligatory but the court retains the discretion to order it. It should not be referred to the lawyers for comment or approval.

The court will take a very dim view of an expert frustrating the process. This is illustrated in the recent case of *Mayr and others v CMS Cameron McKenna Nabarro Olswang LLP* (*[2018] EWHC 3669 (Comm)*). Joint statements indicated that the claimants' expert had not finalised his thinking on any of the issues and, if anything changed, he would file supplemental reports and update the joint statements. A series of supplemental reports followed but the joint statements were not updated. The High Court held that the expert's "stunt" threw the procedure for expert evidence into disarray. The court withdrew its permission to submit expert evidence and made a new unless-style order, setting new directions for the claimants to follow in order to be permitted to submit expert evidence.

AT TRIAL

The presumption in CPR 35.5 is that the expert's evidence will be given in the form of a written report. This means that permission is required for evidence also to be given orally. This may be done at the initial directions stage, otherwise it will be necessary to make an interim application with supporting evidence at a later stage. If this happens, the court will no doubt question why permission was not sought at an earlier stage.

The court has the power to order that experts give oral evidence at trial concurrently, known as "hot-tubbing". This involves opposing expert witnesses giving evidence at the same time and in each other's presence. Generally, questions are put to each expert by the trial judge, who effectively acts as the chair of the debate between the experts. Expert witnesses are enabled to ask questions of each other, and to respond to each other's answers.

The perceived advantages of hot-tubbing include a greater focus on the issues in dispute before trial, a better use of time at trial and potential costs savings. It is, however, a significant departure from the normal practice of examination and cross-examination. It will suit an experienced expert capable of thinking on their feet and practised in giving evidence. Depending on the expert and the issues at stake, practitioners may wish to consider (at the stage at which permission to submit expert evidence is sought) whether to try to agree with the opposing party to rule in or out the prospect of hot-tubbing.

It will likely be sensible to familiarise the expert with the set-up of the court and the procedure for cross-examination, without of course straying into coaching the expert on what to say at trial, which is prohibited. It may also be useful for the expert to attend court when the other party's expert is giving evidence.

When it comes to giving evidence, the judiciary has provided some guidance, which experts would do well to observe (*see "Judicial expectations" above*). In his 2018 keynote address, Lord Justice McFarlane emphasised that an expert should give the answer that they want to give from their professional perspective and, unless they are comfortable in doing so, should not give the answer that counsel's question otherwise entices them to give. His sentiments echo those of Lady Justice

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Rafferty in her 2017 keynote presentation, where she encouraged experts to "know their territory" and not be put off by cross-examination. She also picked up on the theme of clarity, saying that simple words, rather than verbose expression, are needed, as is the ability to identify and distil the main issues at hand.

COSTS AND FEES

If the above were not enough to keep in mind there is lastly, but not at all least, the question of costs and the expert's fees. The incurrence of excessive costs can be one of the courts' main concerns when it comes to expert evidence.

CPR 35.4 contains two important provisions in this respect:

- Parties must provide an estimate of the costs of the proposed expert evidence when seeking permission from the court (*CPR 35.4(2)*).
- The court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party (*CPR 35.4(4)*).

The costs management regime, where it applies, exerts a similar grip on costs and case law shows that the courts will not lightly allow parties to depart from their costs budgets. In *Parish and another v The Danwood Group Ltd*, the successful defendant made a retrospective application to increase its cost estimate for expert evidence (*[2015] EWHC 940 (QB)*). The original budget, which was set before the expert witness had been identified, included a figure of £20,000 for expert witness evidence. However, the expert witness subsequently charged a fee of £70,000. The High Court refused to increase the costs budget and found that the instructions to the expert witness went beyond the field and issues that he was permitted to address.

The various costs provisions should be brought to the expert's attention early on and they will need to understand that timely and accurate fee estimates will be required during the course of the proceedings.

It is equally important to explain the costs consequences to the expert of a failure to comply with the rules. For example, poor expert evidence may not only lead to adverse costs orders, at the more severe end it may lead to indemnity costs. It may also lead to wasted costs orders against solicitors. In *Mengiste v Endowment Fund for the Rehabilitation of Tigray*, for example, the High Court held that there was a strong primary case for wasted costs against solicitors where, at trial, it had been found that the evidence of their client's expert was inappropriate and tendentious, and the expert did not appear to understand his duty to the court (*[2013] EWHC 1087 (Ch)*).

In addition, a court can order an expert to pay costs where a party has suffered loss because of the expert's gross dereliction of their duties, as happened, for example, in *Phillips v Symes and Others (Costs No 2)* (*[2004] EWHC 2330 (Ch)*). Expert witnesses are protected by absolute privilege from claims in defamation, as are all those who take part in litigation, and enjoy immunity from claims brought against them by an opposing party, but not by their own client. In March 2011, the Supreme Court abolished expert witnesses' immunity from suit for breach of duty, whether in contract or the tort of negligence (*Jones v Kaney [2011] UKSC 13, www.practicallaw.com/3-505-7358*).

The expert should be aware that this is the case even where the work relates to preparation for, or involvement in, legal proceedings. This emphasises the importance not only of setting out to the expert the requirements of the CPR but also of explaining the possible sanctions that may follow if there is a failure to comply. One convenient way would be to refer the expert to the sanctions section of the CJC guidance, which summarises the potential outcomes.

LINE OF DUTY

The line of duty is a challenging one for an expert witness to walk. Perhaps it is therefore unsurprising that, according to the Bond Solon Annual Expert Witness Survey Report 2018, one-third of expert witnesses have considered stopping their work as an expert witness (*www.bondsolon.com/media/169392/expert-witness-survey-report-2018.pdf*). As one of the responses stated, this is due to: "more complex work, fewer hours, less pay, shorter deadlines, more pressure, more administration." Add to that the potential for public censure: in a recent Court of Protection case, the court took the uncommon step of publicly upbraiding an expert who had failed repeatedly to meet deadlines due to personal circumstances (*X and Y (Delay: Professional Conduct of Expert) [2019] EWFC B9*).

Expert witnesses will, in many cases, have a day job or at least other commitments and they will understandably be weighing up whether the case is worth their time; in particular, the demands of the court rules and timetable. In light of the costs points above, the experts will also be mindful of their own potential liability.

Experts play an "indispensable" role, according to Lord Kerr when he addressed the Expert Witness Institute in 2016 (*www.practicallaw.com/w-003-9058*). It is important that high-quality experts are not discouraged from performing this role by providing them with proper instructions and assistance from the outset and throughout the proceedings.

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