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Ken Gerber, Esq.,

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By email : ken.gerber@andersonstrathern.co.uk

Dear Ken

Potential CLG Publication : How to Instruct an Expert

Apropos exchanges with CLG Chairman Kirby Tarrant towards the end of last year, I had envisaged sending a paper on mediation through for your approval and publication on the CLG website.

This is still my intention albeit I am now looking to late February/early March.

In the interim I spoke on behalf of credited body Central Law Training at a Seminar in the Autumn of last year. The subject was *How to Instruct an Expert.* The talk was well received.

Since then I have prepared a Paper in relation thereto. This is attached. Although it was naturally confined to matters of English Law and Procedure in England and Wales I wonder whether:

(a) certain aspects of substantive content allied with

(b) some pragmatic tips

might commend themselves to our colleagues in the CLG.

Perhaps you would kindly cast your eye over the enclosed and let me know whether on balance you would consider it suitable for publication.

Best regards

Richard Tymkiw

c.c. Chris Henniker, Esq.

How to instruct an expert

Notes prepared by

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Expert : Preliminary observations

1. What is an expert?

A person who by virtue of their training education or experience possesses specialised knowledge in a particular subject or discipline – beyond that of the average person and of sufficient weight or influence that legal reliance may properly be placed upon:

(a) their views;

(b) their reasoning;

(c) their conclusions.

It follows that an expert's opinion may serve to influence the outcome of a particular question or dispute.

2. Do I need an expert?

Expert evidence may be the first port of call if those privy to a dispute or advising them are confronted with matters of particular weight or complexity going beyond their own knowledge and expertise.

Traditionally the Court (or those acting in a quasi judicial capacity such as arbitrators) will be the determinants of matters of fact and legal questions arising.

Expert input may be viewed as essential or desirable:

(a) to facilitate the framing or definition of the main questions arising in a dispute or

(b) to assess matters of merit or likely outcome or

(c) to form a view on quantum.

3. Preliminary considerations

It is viewed as essential from the outset to arrive at an assessment of the expert's ability to grasp the issues and present as cogent pragmatic and persuasive. The following is by no means exhaustive; more a list of factors which may serve to inform the client's eventual chose of expert:

(a) *Competence :* some experts may possess a greater command of the discipline (in which they profess to be specialised) than their colleagues.

(b) Examine their *curriculum vitae.*

(c) Have they featured in reported cases? Has their expertise been employed to affirm existing law or develop new?

(d) *Rapport :* that almost innate ability to foster goodwill through their input demeanour and observations. Ideally they must possess personality and command the client's confidence.

(e) *Robustness :* are they able to hold their own under heavy fire and cross-examination? Are they versed in giving evidence in a Court of Law? Do they exude a quiet confidence and unflappability? Are they of a sufficiently strong constitution to withstand intimidatory tactics or aggressive challenges to their reasoning and conclusions?

(f) *Formidable but fair :* are they imbued with the confidence and ability to:

  (a) take on board an opposing expert's view; and

  (b) if need be concur; or

  (c) provide a reasoned counterargument against?

  (d) in addition do they have the presence and ability to treat openly and fairly with their opposite number?

(g) *Presentation and demeanour :* do they present in appearance tenor and conduct as professional objective and temperate. Are they built sufficiently strongly to withstand the vicissitudes of litigation and the sudden twists and turns to which such disputes can oft occasion?

(h) *Availability :* (it may be prudent to approach warily those experts who are much in demand and accordingly possibly difficult to contact or overburdened with other commitments). Avoid risks attendant upon the instruction of an expert who has spread themselves too thinly.

(i) *Integrity :* last but not least do they have a clear precept that their duty is owed *singularly and solely to the Court* and not their paying client or any other. Are they able at all times to conduct themselves in non-partisan fashion?

4. How do I locate an expert?

There are many and multifarious ways of so doing:

(a) The professional body whose members are versed in the discipline (germane to the discipline of which your expert is required)

(b) The Academy of Experts

(c) The Register of Experts (a bible which is updated annually)

(d) Professional Journals and publications germane to the field or discipline relevant to the instant dispute.

(e) Case law.

Background & Context

It is submitted that any competent and diligent attempt to engage an expert's services must be founded upon an appreciation of Protocol. Put shortly it is essential to have a clear understanding of the context in which the expert evidence is to be commissioned.

The following is by no means exhaustive : rather a pragmatic attempt to set out in summary form certain essential considerations.

1. Protocols:

Any party to a dispute is primarily obliged to prepare and prosecute it in keeping with a Protocol. The essence of a Protocol is the formulation and presentation of one's claim by letter and document (as distinct from the immediate issue of legal proceedings).

Ordinarily this should take the form of the following:

(a) Service of a Notice of Claim

(b) The sending of a Letter of Claim (if need be with relevant appendices) : giving the intended opponent as much information about the nature of the case and the particular matters relied on, details of quantum and affording the other side a reasonable opportunity in which to respond.

(c) The sending of a Letter of Answer (from one's opponents). Ideally the contents thereof ought to be sufficiently comprehensive as to afford the Intended Claimant an informed grasp of what important matters are agreed and what items of substance are disputed.

(d) If new matters (not earlier foreshadowed) are raised in the Letter of Answer then it is wise to address those by the service of a Letter of Reply.

2. Protocol aims

The express aims of the Protocol are to:

- To improve preaction communications (at the same time establish a timetable for the exchange of information)
- To set standards for the contents of correspondence
- To enable the parties to the dispute to attempt an informed judgment on the merits (much earlier in the day than if they had gone to Court)
- To afford an opportunity for improvement in communications and dialogue and
- To encourage an increase in the number of preaction settlements.
- To assist the Court if unhappily the protocol exchanges do not result in overall resolution and litigation proves necessary.

3. Specific Preaction Protocols

The Civil Procedure Rules [CPR] set out obligatory Protocols (with concomitant Practice Directions) in relation to *inter alia* the following categories of dispute:

Construction and engineering (effective from 02.10.00)

Professional negligence (from 16.07.01)

Housing disrepair (from 08.12.03)

Possession claims : founded on rent arrears (from 02.10.06)

Possession claims : founded on mortgage arrears (from 19.11.08)

Dilapidations : in relation to commercial property (from 01.08.12).

Where no express Protocol applies regard should be had to the steps laid down in the Practice Direction [PRO1].

The term *obligatory* has been employed as the view taken is that failure to adhere to a preaction protocol is likely to give rise to arguments which sound in conduct and may be visited by unwelcome costs consequences.

4. PRO1

PRO1 is a Practice Direction which ought to be followed where no express Protocols apply.

It regulates the preaction conduct of the parties.

It is to be read together with the CPR which encourages the adoption of Protocols.

Its scope is:

(a) to enable the parties to settle issues between them without the need to commence litigation and

(b) to support efficient case management by the Court – if proceedings regretfully cannot be avoided.

These laudable aims in turn are to be achieved by encouraging the parties to exchange information on the issues (well in advance of legal action) and to consider using alternate means of dispute resolution [ADR].

5. Protocols and non-compliance

Although the CPR provides illustrations of what may properly be said to constitute breaches of Protocol, it is respectfully submitted that the following in particular constitute strong *prima facie* evidence of breach.

Such may be said to occur where a party has:

(a) failed to provide sufficient information to the other to enable the opposing party to understand the issues (akin to breach of natural justice where the other side are ordinarily entitled to know the case that they are required to meet)

(b) not acted within a time limit either set out within the relevant preaction Protocol or within a reasonable period

(c) unreasonably refused to countenance attempted resolution through ADR or

(d) without good reason failed to provide answers to matters germane to outcome or disclose documents material thereto.

6. Sanctions for non-compliance

Ultimately there may well be a day of reckoning particularly if the matter cannot settle. This may take the form of Court expressions of opprobrium. Court sanctions are no toothless tiger. Offending parties may be penalised by the making of Indemnity Orders for costs and an award of punitive rates of interest to a ceiling of up to 10% above bank base rate.

If Protocols are not pursued or rudely breached it is open to the offended party to apply for a stay of (possibly) a precipitate litigation and obtain directions for ADR.

(The author has had in recent years experience of opposing parties' failures to adopt or employ a Protocol. In each case successful applications have been made to stay litigation issued in haste and obtain directions which effectively enjoined all parties to pursue ADR.)

The wise and alert practitioner will be alert to advise their client and approach the commissioning of expert evidence in the context of Protocols and ADR (rather than have immediate recourse to litigation).

7. Protocol : permissible departures

The only obvious exceptions to the foregoing might be where:

(a) urgent applications for Injunctive relief are required or

(b) it is necessary to issue protective proceedings (so as to obviate the unenviable expiry of any primary limitation period applicable).

Alternate Dispute Resolution [ADR]

Employment of a Protocol is seen as a desirable and essential precursor to attempts to engage in rational dialogue to resolve a particular dispute or matter through consensual means (as opposed to litigation and confrontation). ADR is a complex and multihued chameleon. It may take the form of any of the following:

(a) without prejudice dialogue party to party (with the consent of the solicitors if each party is represented) or solicitor-to-solicitor. That dialogue in turn may be

telephoned, written or in meetings (if a meeting, a draft Agenda is viewed as essential to maintain focus and relevance).

(b) offers (having regard to the separate provisions of Part 44 CPR and Part 36).

(c) arbitration (both parties agreeing to be bound by the determination of a single party whether in relation to the entire dispute or a particular matter or issue in it).

(d) mediation (where a single party acts as persuader commercial broker or middle man facilitator) to help the parties to reach a commercial resolution.

Case Tracking

If (despite meaningful adoption of Protocols and genuine attempts at ADR) any dispute cannot be resolved and litigation is necessary one cannot confidently approach the engagement of an expert absent of a clear appreciation of the differing approached that the Court will take (on expert evidence) dependent upon the nature or category of the dispute.

Once legal proceedings are issued there are one of three alternative tracks to which the case will be allocated.

That allocation in turn will govern the way in which expert evidence is prepared and presented.

Accordingly and from the outset it is important to have a clear appreciation of the legal *terra firma*:

(a) *The Small Claims Track :* in summary this is the Track to which minor personal injury claims are to be allocated where special damages are no more than £10,000 and damages for personal injury pain loss and suffering currently no more than £1,000. (Moreover it is important to appreciate that any commercial claims for under £10,000 nowadays will not attract costs – win or lose – unless proper reliance can be placed upon a contractual term to that effect)

(b) *Fast Track :* anything which is not suited to the Small Claims Track and possesses a value of no more than £25,000 for proceedings issued after 6 April 2009

(c) *Multi-Track* : for any other dispute bar Small Claims or Fast.

Later in this document a more extensive analysis will be given of the *Part 35 CPR* which are the principal provisions which regulate the engagement of expert evidence (for the purposes of Protocol, ADR and litigation).

However (pursuant to Part 35 CPR) the Court is not just empowered but has an express *duty to restrict* expert evidence as to that which is reasonably required to resolve the proceedings.

In summary small claims are exempted; they possess their own individual *régime*.

The duty to restrict takes concrete form in relation Fast Track cases : each side is restricted to no more than two experts in their individual fields.

Accordingly only a maximum of four experts can be called (two either side).

This is necessary to ensure that the trial lasts only one day.

In comparison, whilst no such restrictions apply to Multi-Track cases, a circumspect approach is nonetheless viewed as desirable (having regard to clear eyed notions of costs proportionality and a lean approach to case conduct).

Guidance on instructing experts

No competent or informed attempt can be made to commission expert evidence absent of a clear appreciation of the following engagement of expert evidence in relation to civil disputes in England and Wales:

(a) Part 35 of the CPR allied with

(b) Practice Direction 35 and

(c) The note *"Guidance for the Instruction of Experts in Civil Claims 2014"*

[CPR 35 PRO 1].

The three stages

Any approach properly founded upon the conscionable competent and alert will attempt to distinguish between the *stage or point* at which expert evidence is commissioned; *different consequences* attach to each:

[1] **The first stage : pre-Protocol:**

It is submitted that any attempt to engage expert evidence at this point is likely to be founded upon the exploratory or formative. The client may well require a broad initial overview. Is there mileage in the proposed claims? What of quantum? Preliminary observations may be invited.

Although this Pre-Protocol stage is not governed by the formal requirements and impositions of Part 35 CPR *et al care must still be taken.* A cautious and circumspect approach may be advisable once it is appreciated that any documents or material produced will oblige the expert (even at this formative stage) expressly to refer or exhibit them by way of Appendices to any report.

In order not to risk compromise to one's own integrity or competence or indeed that of the expert emphasis should be upon thoughtful and cautious overtures (to the intended appointee) to elicit the broad bones of what the expert may be likely to conclude.

It is respectfully submitted that under the first stage there is a premium upon tact and diplomacy.

[2] **The second stage:**

This relates to the commissioning of expert evidence for the deployment of a Protocol.

The author is respectfully of the view that no benefit is to be had from attempting to draw any distinction between the second stage (engagement of expert evidence for the

purposes of Protocol) and the third stage (engaging such evidence for the purposes of legal proceedings).

If expert evidence is needed for the prosecution of a Protocol claim its contents ought to be of sufficient calibre and cogency so as to merit service for the purpose of legal proceedings.

In other words when instructing an expert for Protocol purposes assume *pessimo scenario* : that ultimately your expert will be called to Court to give evidence upon the terms of their report and to be cross-examined thereafter.

At the second stage commission expert evidence as if preparing for trial.

[3] **The Third Stage : legal proceedings : Part 35 CPR**

Regard should be had to the following:

1. **Part 35 General Notes**

The Court has the *power and duty to restrict* expert evidence as to that which is reasonably required to resolve the proceedings.

(*Caveat :* small claims are exempted and reference has been made in passing to the particular restrictions on Fast Track cases).

2. **CPR 35.3 : Experts – overriding duties of the Court**

It is the duty of experts to help the Court on matters within their expertise. This duty *overrides* any obligation to the person from whom experts have received instructions or by whom they are paid.

3. **CPR 35 (3)**

One party may *request information* from the other – where that information is reasonably available to the other and is required for the purposes of enabling the requesting party to instruct their expert.

4. **CPR 35.6**

A party may *put questions* to the other party's expert about his report. He may do so once. Ordinarily he should do so *within 28 days* of service of the other side's expert's report.

It is worthy of note that if such questions are put but not answered (and without good cause) the Court is possessed of the draconian power of prohibiting the other party from relying upon their expert evidence or disallowing the cost and expense of it.

5. **CPR 35.14**

An expert has the right *to seek directions* from the Court.

The view taken is that if an expert feels compelled so to do this is more likely than not to occur *in extremis*.

One should expect one's expert to consult with the legal adviser and client in relation to any matter upon which they possess either doubt or difficulty (with entreaty to the Court being viewed as a step of last resort).

6. CPR 35 (4) Expert evidence and weight to be attached thereto

There is *no principle of law* that the expert evidence of a jointly expert *has to be accepted* unless challenged by other expert evidence.

Armstrong v. First York : this was a case where in a disputed personal injury claim the trial judge accepted the evidence from the injured Claimants as to how the accident had occurred – even though the evidence of the jointly instructed expert (a specialist in accident reconstruction) was that the Claimants' version could not be true.

Moreover the additional point made is that the Court is *not bound to accept* the evidence of one party's expert – where that of the other party is *unconvincing* : *Stephens v. Cannon [2005] Times 2 May.*

(This was a decision of the Court of Appeal which observed that disputed issues - in this case the valuation of property - should not be decided by resort to the burden of proof (i.e. evidence of fact); rather, expert evidence to determine this question was far more appropriate.

7. CPR 35.5

Expert evidence should be given in a written report (unless the Court directs to the contrary). If a claim is under the Small Claims or Fast Track the Court will not ordinarily direct an expert to attend the hearing (unless it is thought necessary to do so in the interests of justice).

In passing it is to be noted that where a trial date is imminent it is quite unacceptable to instruct an expert witness without first of all checking their availability to attend and given evidence. In such an unfortunate instance the Court is justified in refusing to adjourn – even if the expert cannot attend : *Rollinson v. Kimberly Clark Limited [1999] All ER [d] 617.*]

Part 35 CPR : express provisions

These are the main provisions which now govern expert evidence for the use of expert evidence in litigation.

1. CPR 35.1 : Duty to restrict expert evidence

Expert evidence may properly be *excluded* should the Court consider it on balance *unhelpful* to resolving any issue in the case.

2. CPR 35.1 (3)

It is essential that expert witnesses should be independent. The parties may *raise objections* if it is thought that an expert has not met the relevant standard : *Whitehouse v. Jordan [1981] 1 WLR 246 [page 256]* and *The Ikarian Reefer [1993] 2 Lloyds' Rep 68 [at page 81].*

In *The Karian Reefer* the evidence of an expert known personally and professionally to the party who proposed to use it did not by itself render such evidence inadmissible.

When it comes to objections to admissibility (e.g. on the grounds of any lack of impartiality) such contentions ought to be made at the first available opportunity. They are less likely to be entertained or if advanced where trial is imminent : *Liverpool Roman Catholic Archdiocesean Trustees Inc v. Goldberg [2001] 1 WLR 2337*

3. CPR 35.1 (4) Interpretation

The Court will not admit expert evidence to assist the interpretation of documents unless it happens to relate to a particular *term of art* or guidance is required on *relevant commercial practice* : *M. O'Donnell & Sons (Huddersfield) Limited v. Midland Bank Plc [2001] All ER (d) 439*

4. CPR 35.2 Interpretation and definitions

This provision makes matters abundantly clear : reference to *an expert* under CPR 35 is reference to a person who has been instructed to give or prepare expert evidence for the purpose of *proceedings*.

It may be helpful to note in addition that under this provision *single joint expert* is defined to mean an expert instructed to prepare a report for the Court *on behalf of two or more parties* including the Claimant to the proceedings.

It follows that CPR 35.2 (1) *necessarily excludes* an expert instructed by a party pre-Protocol and pre-litigation (i.e. *Stage* 1) who is asked to advise (but will neither prepare a report nor necessarily be called to give evidence).

5. CPR 35.3 (2) Power to order a witness to pay costs

The Court is empowered to make Costs Orders against an expert who occasions significant expense through his own flagrant disregard of his duties.

The author submits that the Court is unlikely to invoke its powers save for wholly abhorrent circumstances. If alerted the Court might well employ its discretion to deliver admonition and guidance.

However a warning is not viewed as either necessary or curative where the expert has already made his declaration and a statement of truth in keeping with the Practice Direction yet fallen foul of his independent duties : *Phillips v. Symes [2005] 4 All ER 519.*

Even in *Phillips* it was held that such an Order is likely to be highly unusual and any Costs Orders constrained to those amounts for which the expert's default can properly be held to have been attributable.

6. CPR 35.3 (4) Expert : no immunity from the suit

Although it had previously been thought that an expert who had given negligent advice (and accordingly have contributed to or occasioned a disadvantageous outcome) was able to invoke the cloak of immunity from civil suit, this is no longer the case.

The Supreme Court has since *abolished* such immunity : *Jones v. Caney [2011] 2 All ER 671.*

7. CPR 35.3 (6) Conflict of interest

Somewhat oddly a conflict of interest of itself does not automatically disqualify an expert. Nonetheless any conflict should be *flagged up* as soon as possible.

A question of this ilk arose in *Toth v. Jarman [2006] 4 All ER 1276.*

The Court recommended that all experts should end their reports with statements of the following:

(a) that they had *no conflict* of interest of any kind – other than those expressly disclosed (if any) in their report

(b) that they did not consider that *any interest* which they had disclosed affected their *suitability as expert* on any issue on which they had given evidence (or proposed so to do) and

(c) they would *advise* the party by whom they were instructed if – between the date of their report and trial – there was *any change* in such circumstances as might affect their answers to the foregoing.

In passing it is noted that an expert need not necessarily be subject to automatic disqualification where solely because he is acting for both sides : *Meat Corporation of Namibia Limited v. Dawn Meats (UK) Limited [2011] All ER (d) 67.*

8. CPR 35.4 : Court's power to restrict

There is no right to call expert evidence without Court permission.

When applying for Court permission, an estimate of the expert's likely costs is desirable if not essential.

A choice needs to be made between either nominating a *named expert* or an expert for *the relevant field.*

In practice it is thought that greater flexibility is open to the party if *the field* is nominated rather than being tied to a nominated expert. (The author's emphasis is upon flexibility of choice and instruction).

9. CPR 35.4 (1A) : late applications

An application to adduce expert evidence late in the day (where trial is looming) may (not unnaturally) be rejected upon the grounds of unjustified delay and inconvenience to others (the more so if it cannot be shown that the evidence in question is reasonably required to resolve important questions in the proceedings) : *Charles Terence Estates Limited v. Cornwall Council [2011] All ER (d) 38.*

10. CPR 35.4 (2) : Second expert

Circumstances might arise where a client wishes to instruct a second or alternative expert (because they are dissatisfied with the report of the first).

Although always a matter for the Court's discretion, it is thought that ordinarily permission is likely to be given *upon condition that* the party requesting discloses a copy of the report of the first expert : *Beck v. Ministry of Defence [2003] Times 21 July.*

In passing it is noted that as a condition that the first report should not be disclosed *should not be imposed* where the Order of the Court giving permission to adduce expert evidence *did not identify* a particular expert – and thus left it to the party to choose on which of two expert's reports he could rely : *Vasiliou v. Hajigeorgiou [2005] 3 All ER 17.*

In *Vasiliou* the Court of Appeal held *inter alia* that (disclosure of the report of the expert first instructed) did not comprise either abrogation or emasculation of legal professional privilege; rather disclosure of the first was *a condition of waiver of privilege* in relation to the right to adduce the evidence of a second expert.

It also should be noted that this condition applies to *draft reports* containing the substance of the first expert's opinion.

11. CPR 35.4 (2) : Expert and change of heart

Where a party has had a free choice of expert and put forward an expert as part of their case – the mere fact that the chosen expert has *modified or changed* their view is *not of itself a good reason* to permit the expert to be disinstructed and a new one engaged in his stead : *Guntrip v. Cheney Coaches Limited [2012] EWCA Civ.392.*

In passing it may be helpful to note that the practice of requiring disclosure of *a rejected report* as *a condition* for allowing the second applies – whether the first report was prepared *before or after* the start of proceedings : *Edward-Tubb v. J.D. Wetherspoon Plc [2011] EWCA Civ. 136*; the moreso where the parties had embarked upon the Protocol – and thus engaged with each other in the process of the claim.

[This set of circumstances may be readily distinguished from *the first Stage* where an expert has been approached for guidance and preliminary observations *in advance* of the adoption of a Protocol and accordingly falls outside the provisions of CPR 35.2 i.e. expert not instructed for the purpose of *proceedings.*]

12. CPR 35.7 : Powers of the Courts to order single joint expert

Where two or more parties wish to submit expert evidence on a particular topic the Court may direct that evidence in relation thereto be given by a single joint expert:

Where the Court is minded to make such an Order but the parties cannot agree upon the identity of the candidate the Court may:

(a) select the expert from a list prepared by the parties or

(b) direct an alternative methodology (for example selection by the President of the Institute of Arbitrators).

A single joint expert is perhaps ideally suited to the following:

(i) claims of low value or simple issues on quantum

(ii) possibly somewhat more complex or contentious disputes (with the single expert being limited to less contentious items) or

(iii) claims involving a large body of expert evidence from differing disciplines (with one single expert engaged to provide an overarching view in relation thereto).

As a mild but essential *Caveat* : in relation to all Multi-Track litigation it is ventured that it is unlikely to be appropriate to appoint a single expert on main issues of liability causation *et al.*

13. CPR 35.7 (5) : What should happen where the joint experts' report is unsatisfactory?

This question was considered in the leading case of *Daniels v. Walker [2001] 1 WLR 1382 CA.* This was an Appeal before the Court (Civil Division) presided over by Master of the Rolls Lord Woolf. The issue before the Court (resulting in the Appeal) was whether the Defendant should have the right to have the Claimant (Mr. Daniels) examined by a consultant occupational therapist.

In the instant case Mr. Daniels was a personal injury Claimant who had sustained severe injuries in a collision with a car driven by the Defendant Mr. Walker. Liability was not in issue. The parties were *ad idem* that the Claimant would require some form of care for the remainder of his life.

The question on which the parties were apart was duly encapsulated by the judge at first instance:

> *"the issue of care is by far the largest issue in the case .. whether or not it is necessary for this child to have a fulltime residential carer or something less than that"*

In deciding whether permission ought to be granted the Court stated that it was mandatory to have regard to the following factors:

- The nature of the dispute and number of issues
- The reasons advanced for the wish to engage new expert evidence
- Quantum
- Apart from monetary considerations, the nature and importance of the questions at stake
- The effect upon trial of allowing in additional expert evidence
- Any delay in the making of the application
- Any delay in the trial process that a new expert might occasion

- Other special features and

- (last but not least) the question of overall justice (having regard to the overriding objective) to the parties in the context of litigation.

It is submitted that *Daniels is a* classic employment of the Court's discretionary powers pursuant to the provisions of Part 35.7 CPR.

In passing it should be noted that although the Court possesses discretion to permit cross-examination of an expert witness the preferred method for probing any report ought to be by way of written questions.

Where cross-examination is to be allowed, the expert should first of all be given advance notice of the topics to be covered - and of any fresh evidence to be adduced : *Popek v. National Westminster Bank [2002] EWCA Civ. 42.*

Popek comprised long and somewhat convoluted proceedings. The Claimant sued the Defendant bank claiming *inter alia* damages for breaches of contract, negligence or fiduciary duty.

The brief facts : the Claimant owned and ran a construction business. He wished to build two houses. The Claimant's claims were founded upon alleged shortcomings in the conduct and advice of the bank connected with a mortgage facility advanced to him for the purpose of the development in question. The Claimant's claims were struck out at first instance on the grounds that in effect the Claimant's claims were devoid of merit. The Claimant launched his Appeal. The decision to strike out was upheld.

In *Popek* two single joint experts were appointed : one Ms. Blyth (on matters of both liability and quantum) and a separate single joint expert (one Mr. Fleet) on the Defendant's rights to charge interest (where Ms. Blyth was of the view that this element fell outside her realm of competence).

The Court of Appeal upheld the strikeout order.

However it considered the question of whether (had there been a trial) the Claimant would have been able to put questions to Ms. Blyth - notwithstanding her capacity as a single expert.

Express reference was made to the Note attached to Part 35.7 CPR to the effect that both parties at trial would have the opportunity to cross-examine a single joint expert (albeit that this should be with a degree of restraint).

However the Court of Appeal held that this Note was not to be regarded as of general application.

Rather, emphasis was placed upon Part 35.6 CPR – the preferred approach being that a party should put written questions to the single joint expert, only once and solely for the purposes of clarification unless the Court otherwise directs : following *P v. Mid Kent Healthcare National Health Service Trust [2002] 1 WLR [2010].*

It is to be further noted that a single joint expert should not attend any meeting or conference that is not joint – *unless* all the parties are first *agreed in writing P v. Mid Kent* aforesaid.

The Appeal raised a point of some significance : what should happen when a single expert jointly instructed makes a report and one party or another is unhappy with its contents?

Lord Woolf gave definitive guidance and laid down the following precepts should similar difficulties be encountered:

(i) absent of agreement between the parties on the matter of joint instruction, it was quite in order for one party to give separate or supplementary instructions to the expert

(ii) if a party was unhappy with the contents of a report the first step was to ask questions of the expert; if these did not resolve the problem it was open to the Court to consider an application by the objecting party to allow in the evidence of another expert

(iii) were there a real risk of injustice in a substantial case (having regard to the overriding objective) to prohibit a party from calling other or additional expert evidence then they will ordinarily be permitted to do so. The objections must be well founded (and not fanciful).

(If such an application is made the Court of Appeal stated that it would be good practice to be able to demonstrate the existence of a respectable body of expert opinion differing from that of the report the subject of objections; this could be done by exhibiting a short letter or report from the expert on whom the Applicant wished to rely.)

(iv) the decision as to whether the report of the further expert should be *used at trial* should not be made until the experts themselves had met in an attempt to resolve their differences.

14. CPR 35.9 : Power of the Court to direct a party to provide information

Where a party has access to information not necessarily available to another party the Court may direct the other party in possession of it to:

(a) prepare and file a document recording information and

(b) serve a copy of it on the other side.

The contents of a report

This is to be submitted as a signal provision of CPR Part 35. Part 35.10 (1) states : *an expert's report must comply with the requirements set out in Practice Direction 35 (PD 35).*

In summary to ensure compliance such a report must:

(a) give details of the expert's qualifications (e.g. exhibit their cv)

(b) give details of any documents examined

(c) contain a statement setting out the substance of all facts and instructions material to any opinions of the expert in their report

(d) make clear as to which facts to which the report refers are within the expert's own knowledge (as opposed to being told to them)

(e) identify the maker or author of any examination measurement test experiment or suchlike employed for the purposes of the report (together with their qualifications) and further state whether such was carried out under the expert's supervision or not

(f) if there is a range of opinion a summary thereof must be given and with reasons as to why the expert holds to their particular opinion in the circumstances

(g) there must be a summary of conclusions

(h) if the expert is unable to provide an opinion without qualification that qualification must be stated

(i) a statement that the expert both understands their duty to the Court (and has complied therewith) and is also aware of the requirements of Part 35 CPR, PD35 and *Guidance for the Instruction of Experts in Civil Claims 2014 [CPR 35 PRO 1].*

(j) the report must be verified by way of a Statement of Truth (viz *I confirm that I have made clear those facts and matters to which my report which are within my knowledge and those which are not. Those that are within my own knowledge I confirm to be true. The opinions that I have expressed represent my true and complete professional opinion as to the matters to which they refer*).

No privilege from disclosure

In passing it should be noted that instructions to an expert (given in the context of litigation and subject to the provisions of Part 35 *et al*) are *not privileged from disclosure* but the Court will not in relation thereto:

(a) order disclosure of any specific document or

(b) permit any questioning in Court other than by the party who instructed the expert unless satisfied that there are *reasonable grounds* for so doing.

In order firmly to close the door against the possibility of any searching or expensive application seeking the bases upon which the expert was instructed or enquiring as to the documents and information given to them, it may not be unhelpful to settle upon terms of:

(a) a joint Letter of Instruction – in the case of a joint single expert or

(b) a Letter of Instruction – in the case of each party calling an opposing expert.

In either case the Letter of Instruction - be it category (a) or (b) - should be exhibited to the Report.

In the case of *Lucas v. Barking Havering & Redbridge Hospitals NHS Trust [2003] 4 All ER 720* it was held that an expert's statement of instructions was *not inadequate* – even though it did not set out the full text of the document (that is another expert's report and a witness statement) which had been included as *part of* those instructions.

Draft Reports

It must be further noted that draft reports are ordinarily privileged from disclosure : CPR 35.10 (3).

The common law rule that litigation privilege attaches to expert reports obtained for the purposes of giving legal advice to a party remains unaffected by the *limited exception* afforded by Part 35 (by which the basis of the expert's instructions are required to be disclosed).

In summary the Court has no power either under Part 35 (or indeed the Court's general powers of case management) to direct disclosure of the experts' draft reports. They remain privileged : *Jackson v. Marley Davenport Limited [2004] 1 WLR 2926.*

Discussions between experts

In summary the provisions of CPR 35.12 empower the Court to direct discussions between the experts to enable them to identify and discuss expert matters in proceedings and where possible reach an agreement upon them.

It is open to the Court to direct that specific issues be considered.

The Court may also direct that following such discussions the experts prepare a *joint statement* for the Court – setting out those items on which they agree and those on which they do not (in the latter case giving a summary of their reasons).

It should be noted that the contents of discussions between experts are traditionally treated as without prejudice. Ordinarily no reference will be made thereto at trial unless the parties themselves so agree.

Even where experts reach agreement on a particular question during discussions that agreement *does not bind the parties* – unless the parties expressly agree to be so bound.

No reliance

Pursuant to CPR 35.13 (2) there is no obligation on a party to disclose a report which they do not intend to use. This would appear to be a matter of straightforward common sense but indeed is supported by authority : *Carlson v. Townsend [2001] 3 All ER 663.*

Experts : practical considerations

The following are certain practical considerations the purpose whereof is to further the competent and cost-effective engagement of experts.

1. **Letter of Instruction**

   Ideally this should:

   (a) identify the client

   (b) provide a summary factual matrix

(c) outline the actual or probable main questions in dispute

(d) specify the expert's remit

(e) propose a timescale for the preparation of the report

(f) make express reference to costs budget or fees levels

(g) specify the parties responsible for payment

(h) any documents or papers likely to prove germane should be collated and exhibited to the Letter of Instruction (preferably by way of Index or Schedule) in the full knowledge and certainty that reference will be made thereto in the Report to be to be commissioned.

Template

On the matter of *draft reports* it is submitted that it is quite permissible to prepare draft templates for the expert's consideration and to have professional input upon the substance of any draft report or the tenor thereof prior to its ultimate perfection in readiness for filing and service.

Moreover whilst mindful of the expert's overriding duties, there can be no objection in assisting one's expert to strive for focus certainty and cohesion - for the purposes of presentation and credibility.

2. PRO 1.12 : Annex C

Quite apart from the regulatory provisions (CPR Part 35, PD 35 and the *Guidance* aforesaid) it is as well to be aware of the provisions of PRO 1.12 at Annex C which expressly provides that once proceedings have started:

(i) expert evidence may not be used in Court without the permission of the Court

(ii) a party who instructs an expert will not necessarily be able to recover the costs from any other party and

(iii) it is the duty of an expert to help the Court on matters within the expert's scope of expertise and this duty in turn overrides any obligation to the person instructing or paying therefor.

The subsequent provisions of PRO 1.12 make clear that many matters can and ought to be resolved without the need for advice or evidence from an expert.

Moreover if an expert is required the parties should carefully consider how best to keep costs down by agreeing to instruct:

(a) a single joint expert (that is one engaged and paid jointly by the parties – whether instructed jointly or separately) or

(b) an agreed expert (where the parties agree upon the identity of the candidate but only one party instructs the expert and pays the expert's costs).

Should the parties fail to agree on nomination the party seeking to call the expert should compile a list of potential candidates serve it on the other and invite agreement as to whom the other would wish to instruct.

Within 14 days of receipt of such a list the second party may object to one or more of the experts nominated thereon. If there remains one or more experts who are acceptable then it is open to the first party to instruct any to whom objection has not been raised.

Were the second party to object to all it remains open to the first party to instruct an expert of their own choice; both parties should bear in mind that if proceedings are started the Court will consider whether a party has acted reasonably when either instructing (or indeed rejecting) an expert.

Dated Wednesday this 23rd day of December 2015

RPT
Partner