# Experts and their evidence: some recent guidance

Thomas Crockett, March 2019

This year is just a few months old, but there have already been a number of interesting first instance decisions which should be of interest to any litigator involved with the use of expert witnesses.

It is clear that the authors of these judgments have sought to provide some sound practical guidance. I shall attempt to distil this into five things to think about, when discussing these authorities and others of no more than about a year's vintage.

## 1. Failures by experts to adhere to the orders of the Court could have dire consequences

The judgment of Mr Justice Males in *Mayr & Ors v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3669 (Comm) is one which caused quite a stir amongst litigators when it was published at the end of January 2019.

Here, the Court effectively struck out large portions of the Claimants' case (said to be worth several hundred million Euros) without peremptory order or warnings (i.e. no 'unless order'). When this issue was raised by counsel for the Claimants, Males J held that *"…a party is not entitled to disregard the rules, secure in the knowledge that until an unless order is made it will always get a second chance"*!

This matter came before the Court on 14 December 2018 ahead of trial due to commence on 22 January 2019. It was argued by the Defendant that Professor Kilgallon, the Claimants' expert for the Turkish pharmaceutical industry, had failed to properly engage with his opposite number pursuant to the Court's order for a joint meeting and a joint report ahead of trial. There was no application for relief from sanctions and no solution to the reality of the situation proposed by the Claimants which found favour with the Court. It was held:

> *"13. …When an expert fails lamentably to comply with that order the whole procedure for further expert evidence in the case is thrown into disarray. The purpose of the supplemental reports is to enable the experts to comment on and express their further views upon the points*

*on which they remain in disagreement, having had the benefit of a proper experts' discussion at which they can properly understand the point of view of the opposing expert.*

*14. That has simply not happened in this case. It is impossible for the Defendant's expert to say anything further in a supplemental report until he knows what Professor Kilgallon has to say about the matters on which he has expressed his opinion. …*

*16. It seems to me that the position is that the Claimants have failed to comply with the terms on which they were given permission to adduce evidence of the Turkish pharmaceutical industry in this case. The burden is on them to provide a workable solution which they have not done. It is for them too to apply for relief from sanctions. Again, they have not done so. They would need, if they were to do so, to give a proper explanation of why it is that Professor Kilgallon has taken this approach on not one but two occasions. He must have been told, he certainly should have been told after the LMM expert memorandum was produced, that this was not an acceptable way to proceed.*

*17. The order which I make therefore is that as matters stand the Claimants do not have permission to adduce evidence of the Turkish pharmaceutical industry at the trial. The burden will be on them to come forward, as I have said, with a proper and acceptable procedure which will include a proper joint meeting and will meet the criteria of relief from sanctions if they wish to pursue this evidence. If they have simply left it too late to do so in an acceptable way then that is something for which they must take the consequences."*

The consequence of Males J's ruling was dire in that the Claimant had no evidence upon which to prove substantial portions of their case as to quantum.

The lesson is that it should be anticipated that Courts will hold litigants responsible for failures by their experts who must be required to comply with the orders of the Court, probably particularly in relation to the production of so crucial a document as a joint report following a meeting. Close and active management of experts would seem prudent to ensure compliance. In default of this, the party needing to seek relief would be advised to do so promptly and put forward practical suggestions as to how to proceed without jeopardising any trial date whilst allowing such expert evidence to be timeously adduced with reasonable time for it to be considered.

**2. Every effort should be made to cooperate to agree concise agendas for experts' joint meetings**

In *Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 (QB), the Claimant's claim for damages in respect of an iatrogenic injury was dismissed on the basis of the expert evidence.

Mrs Justice Yip in her judgment made specific comment as to the Parties' expert colorectal surgeons' joint reports which were produced following the inability of the Parties' legal teams to agree a joint agenda for discussion. As a result, at trial the Court was presented with a joint report of more than 60 pages, containing repetitive questions.

The Court pointed out that this approach did little to further the objective enshrined in paragraph 9.2 of the Practice Direction to CPR 35 *"to agree and narrow issues"*. It was held that *"Parties should adopt a common sense and collaborative approach rather than allowing this stage of the litigation to become a battleground"* and commented that *"*[p]*erhaps greater input from Counsel may have assisted"*.

A few months later, Yip J again came across the same problem when trying the clinical negligence case of *Welsh v Walsall Healthcare NHS Trust* [2018] EWHC 1917 (QB). Again, the joint statements were *"not as useful as they might have been. The difficulty was caused by the inability of the parties to agree a single agenda for the experts' consideration"*.

Expressing certain exasperation to once again be coming across this issue and seeking an explanation, the Court was referred to paragraph 13 of the model order which states: *"… solicitors shall use their best endeavours to agree the Agenda. ... In default of agreement, both versions shall be considered at the discussions. …"*.

The learned judge proffered some guidance as to the proper interpretation of this at paragraph 36 of her judgment:

*"36. It was suggested that the form of the model order encourages more than one agenda to be sent to the experts. I cannot agree with this. The standard direction makes it clear that the solicitors are required to do their best to agree a single agenda. In the vast majority of cases, any disagreement ought to be capable of resolution through a bit of give and take. It may be appropriate to insert some additional questions into the draft at the Defendant's request. It certainly should not become routine to provide two versions which, as here, travel over much of the same ground. That approach tests the*

*patience of the experts (and frankly of the Court); produces a lengthier joint statement; potentially increases costs and is simply not the best way to focus on the issues. I do not think that anything further needs to be said or done in this case. However, if this worrying trend continues, parties may find that Courts begin considering costs consequences."*

These dicta are likely to be of some use in justifying the use of counsel or indeed more senior fee earner time at this stage and the allowance for the same at the costs budgeting stage. It is also likely to be a useful authority for a party seeking to encourage the cooperation of their opposite number when seeking to agree agendas. An issue-based costs order is certainly possible, should such an attempt meet with intransigence.

**3. Think hard before seeking to restrict the scope of an opponent's expert evidence rather than leaving the matter for trial**

The case of *Moylett v Geldoff & Anor* [2018] EWHC 893 (Ch) was an intellectual property matter litigated between members of the Boomtown Rats about the authorship and copyright of the hit 'I don't like Mondays'.

In this case, the first Defendant applied to strike out parts of the Claimant's expert dealing with the significant issue in the case, namely whether the music was more likely to have been composed on a guitar or a piano. It was argued that the Claimant's report was objectionable as it contained opinions from professional guitarists, for which permission had not previously been granted and further went beyond what was permissible by expressing an opinion on the ultimate question in the proceedings.

Mrs Justice Carr gave judgment on 14 March 2018. In relation to the first issue, she held that she should apply the ratio of *Rogers v Hoyle* [2013] EWHC 1409 (QB) and hold "*it is much preferable for the Court, rather than picking through expert reports, seeking to excise individual sentences and engaging in an editing exercise, to allow the trial judge to consider the report in its entirety, assuming that it is genuine expert evidence, and to attach such weight as it sees fit at the trial to those passages in the report.*" In the instant case, she held that the Claimant's expert had been entitled to rely upon professional guitarists and was obliged to set out that he had done so in his report. It was held that although one paragraph was on the margins of admissibility, in the context of the whole report, the expert was forming his own view based on what had been demonstrated to him and not pursuant to any

suggestion that the professional guitarists themselves were providing expert opinion upon which anything turned.

As to the second question, Carr J was forthright in holding that this expert be allowed to express himself as he wished to and the weight to be placed upon such evidence be a matter for the trial judge. Insofar as it dealt with whether the music was more likely to have been composed on a guitar or a piano it was admissible evidence and might well be the subject of expert opinion in reply.

Mrs Justice Moulder made a similar ruling in *A v B* [2019] EWHC 275 (Comm) in a judgment published on 15 February 2019. Here, in a case where the Defendant challenged the Claimant's claim for an arbitral award, the Defendant took issue with parts of an expert's report. These parts of the report purported to deal with questions of construction or the application of the law to the facts – these in part were said to cut across arguments which the Defendant would wish to make at a hearing listed for March 2019. The Defendant sought to distinguish and limit the scope of *Rogers* on the basis that this can be distinguished from a report about applicable foreign law. This submission was rejected with Moulder J holding that the Court of Appeal's guidance was of general application. She held that the arguments run by the Defendant should properly be made before the judge at the March hearing and to determine the matter now would be an undesirable pre-emption.

*Rogers* remains of general application. Unless so obviously or grossly inappropriate that it should not be permitted to form the basis of a party's case at trial, the Courts should allow such expert evidence as a party wishes to adduce and leave the questions of admissibility and ultimately credibility and weight to the trial judge.

**4. Beware of pre-emptively obtaining and utilising expert evidence for which permission has yet to be given**

On an application from the Claimant for permission to rely on a report from a neurosurgeon in the clinical negligence case of *Hall v Derby Teaching Hospitals NHS Foundation Trust* [2018] EWHC 3276 (QB), Master Thornett, with unabashed frustration at the manner in which various aspects of this case had been presented over two hearings, emphasised the risks of presumptive steps being taken by a party in respect of expert evidence obtained but upon which the party had no permission to rely.

The Courts are understandably and properly keen to stress the need for proportionality, expedition and proactivity in the prosecution of claims. No doubt with this in mind, when the Claimant party in this case read in the report of its neurologist (in respect of which permission had been obtained) that the report of a neurosurgeon was required. The same was obtained and sent to the already instructed experts for comment.

This neurosurgical opinion did not support any causal link relevant to the injuries in this case. The neurosurgeon considered the Claimant's ongoing symptoms to be related to a psychiatric reaction. The Court thus assessed that his evidence when viewed in isolation was limited to whether the Claimant may require certain future treatment which was a minor aspect of the Claimant's claim. Permission to rely upon this evidence was thus refused. The Claimant was put to the expense of having to excise all reference to that evidence in the addenda reports of her other experts.

This appears a harsh judgment and open to criticism from the perspective of the Claimant's solicitors. They no doubt would have felt their client exposed by not having obtained evidence recommended by another expert, if only to assist in providing a diagnosis and prognosis by eliminating a neurosurgical aetiology. This case however serves as a stark reminder that the exercise of a Court's discretion as to expert evidence should not be taken for granted and to do so is liable to lead to costs being wasted. This must be a risk for lawyers to consider and clients and insurers to be warned about.

The more liberal approach taken on the facts of *Mays (a Protected Party by the Official Solicitor) v Drive Force (UK) Ltd* [2019] EWHC 5 (QB) by Deputy Master Hill QC on 4 January 2019, however, shows us the specific nature of the judgment as to which experts a party would be advised to instruct.

This was a high value personal injury case in which the Claimant had sustained traumatic brain injuries and orthopaedic injury pursuant to an accident at work. As a result, he lacked litigation capacity and was unable to return to paid employment. The Defendant argued that the Claimant's life-expectancy by reason of his pre-existing co-morbidities (smoking, hypertension, obesity, colitis) was an important factor in the case and sought permission to rely on expert evidence as to the same. This was opposed by the Claimant.

The Deputy Master allowed the application on the grounds that this was an appropriate case for such free-standing statistical life expectancy evidence. The fact that the value of the case was high and such evidence could make a significant impact upon quantum was taken into account, as was the existing

neurologist experts' inability to address all the factors potentially pertaining to life expectancy absent the index accident.

The Court emphasised that this would not lead to the opening of any floodgates for the instruction of such experts. It is however difficult to deny the utility (probably mostly to Defendant parties) in obtaining such statistical evidence in any case where there is a substantial lifetime claim for damages, such as for care, accommodation or services, where the claiming party had some co-morbidity known to downwardly affect life expectancy and where this is not wholly addressed by other experts.

## 5. Imposing retrospective conditions upon reliance upon expert evidence is likely to be very difficult

The case of *Bowman v Thompson* (2019) (unreported, QBD, Dingemans J, 21 January 2019) concerned a situation probably familiar to many of those involved in litigation where expert evidence is prevalent.

This was a clinical negligence claim brought against a general practitioner where it was alleged that the Claimant's cauda equina syndrome had been mismanaged. The Claimant obtained permission to rely upon the report of a consultant urologist who provided an initial 'advisory only' report and then a substantive report following the issuing of the Claim. Thereafter, the Claimant instructed a further urologist expert, having lost confidence in the first expert.

During the course of the disclosure of the latter report, the Defendant discovered the involvement of the earlier expert and sought disclosure of this report. This was resisted by the Claimant on the grounds of litigation privilege but disclosed the earliest report on a 'without prejudice basis'.

The Defendant thus made an application to the Court that the Claimant only be allowed to rely upon his served substantive report should he disclose the one not served. This was refused on the basis that the judge held that there was no discretion to impose retrospective conditions on a party's permission to rely on expert evidence already granted.

Mr Justice Dingemans dismissed the Defendant's appeal of this decision. He held that there was no vehicle for the retrospective imposition of a condition on existing orders and even if it had been argued that the judge below should have varied the order pursuant to CPR 3.1(7), in the absence of mistake or misstatement, such an exercise of discretion would not have been appropriate.

The lesson from the Court is that the time to seek such a condition as sought by the Defendant in this case (see also *Edwards-Tubb v JD Wetherspoon PLC* [2011] EWCA Civ 136) was at the permission stage, before which is the time to seek confirmation as to whether any other experts had been instructed by their opposite number. An affirming answer should lead to the seeking of an order conditional upon the disclosure of the earlier evidence. A negative answer should be reassuring if correct and if not, potentially grounds for a Court to exercise a discretion to vary under CPR 3.1(7).

**Thomas Crockett**

Hailsham Chambers, March 2019