

## Expert evidence

The law in relation to expert evidence is not straightforward and this article is intended as a walk through the major issues that may arise.

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Many cases are technically complicated and may, on the face of it, require expert input to cut through the matters in dispute. However the law in relation to expert evidence is not straightforward and this article is intended as a walk through the major issues that may arise.

### Expert advisor v expert witness

Sometimes what a party needs is an orientation opinion or a steer on how a claim or a defence should be formulated. A party has the option of appointing what is known as an expert adviser. This person may or may not become the expert witness but key points to note are:

- an expert adviser owes duties to **the party instructing him** not to the court
- instructions to an expert adviser are generally privileged
- the fees incurred in instructing an expert adviser are not generally recoverable from the other party in the event that the party wins (so consideration needs to be given as to the value of the case and whether it is worth the cost)
- if at some stage in the proceedings it is deemed necessary to instruct the expert adviser as the expert witness then it is prudent to send new instructions to the expert at that stage.

### Is expert evidence required?

It cannot be assumed that because a case is technically difficult that expert evidence will be allowed. CPR 35.1 makes it clear that:

*“Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings”*

What does that mean in practice? The issue was looked at in the case of **British Airways PLC v Spencer & Others** [2015] EWHC 2477 (and has since received Supreme Court approval). The High Court set out what the court should look at to decide if expert evidence was needed. In relation to the pleaded issues the court should look at:

- If the expert evidence is **necessary**. If it is then it **must** be admitted.
- Is the evidence would **assist but not necessary** then the court should be able to decide the issue without it.
- If the evidence is **reasonably required to resolve the issues** taking into account all the circumstances of the case then the court **may** allow it.

Whether expert evidence is required therefore will vary case to case and each case will need to be determined on its own particular facts and issues.

A recent case demonstrates that expert evidence is not always regarded as necessary. In the case of **Carr & Others v Formation Group PLC & Others** [2018] EWHC 3116 (Ch) in a multi-claimant claim against sports agents and financial advisers there were a number of allegations, one of which related to dishonesty. The court held that expert evidence would not be permitted as the court was perfectly able to make a determination at an objective level as to whether there was dishonestly.

# The court's involvement in allowing expert evidence

Whilst a party may wish to instruct an expert early in the process and incur significant expense it needs to be borne in mind that an expert can only give evidence if the court gives permission for that expert to give evidence.

CPR 35.4 sets out the criteria:

- “(1) No party may call an expert or put in evidence an expert’s report without the court’s permission.*
- (2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –*
  - (a) the field in which expert evidence is required and the issues which the expert evidence will address; and*
  - (b) where practicable, the name of the proposed expert.*
- (3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address.”*

## Instruction of the expert

This comes in two parts: the letter of instruction and then the retainer letter.

The letter of instruction is disclosable. It is therefore important that care is taken over the content of that letter and also what attachments are sent.

CPR 35.10 states:

- “(1) An expert’s report must comply with the requirements set out in Practice Direction 35.*
- (2) At the end of an expert’s report there must be a statement that the expert understands and has complied with their duty to the court.*
- (3) The expert’s report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written”*

Practice Direction 35 gives guidance on the content and provides that the report must:

- “(1) give details of the expert’s qualifications;*
- (2) give details of any literature or other material which has been relied on in making the report;*
- (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;*
- (4) make clear which of the facts stated in the report are within the expert’s own knowledge;*
- (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert’s supervision;*
- (6) where there is a range of opinion on the matters dealt with in the report –*
  - (a) summarise the range of opinions; and*
  - (b) give reasons for the expert’s own opinion;*
- (7) contain a summary of the conclusions reached;*
- (8) if the expert is not able to give an opinion without qualification, state the qualification; and*
- (9) contain a statement that the expert –*
  - (a) understands their duty to the court, and has complied with that duty; and*
  - (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014”*

The Guidance referred to can be found [here](#).

The expert's duty is to the **court** and not to the party to whom the report is provided.

Once reports are exchanged it would normally be the case that the experts on both sides to discuss matters and for the production of a joint statement. The purpose of these discussions is to try and narrow down issues and see if there are areas of possible agreement.

CPR 35.5 makes it clear that it is anticipated that evidence will be given by way of written report. The court would need to make a direction for evidence to be given in person.

If evidence is given in person there are a number of ways in which that evidence can be given from the traditional way of evidence given to 'hot-tubbing' where the experts give evidence at the same time.

The costs are recoverable in principle (subject to the normal cost rules).

## Single joint expert

It is open to the parties to agree on the instruction of a single joint expert (CPR 35.7(1)). Obviously it would be cheaper to instruct a single joint expert but it does not tend to happen in larger cases unless it is on an issue which is not central to the case (for instance property valuation). It can be helpful in smaller claims in keeping the costs proportionate.

## The expert's duty of care/liability to those instructing them

The case of **Jones v Kaney** [2011] UKSC 13 establishes that an expert giving evidence does not have immunity and may be sued. Lord Dyson said:

*"[The expert's] duty to the client is to perform his function as an expert with reasonable skill and care. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be in breach of duty to the client. ... If [the expert] gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court ... but he will be in breach of the duty owed to his client."*

In addition to being able to sue the expert there is the possibility of obtaining a cost order or complaining to the professional body.

There are a number of recent cases where the trial judge has criticised an expert on the evidence given opening up the possibility of suing the expert:

**X and Y (Delay: Professional Conduct of Expert)** [2019] where the expert had failed to meet deadlines because of the expert's personal circumstances.

**Riva Properties Limited v Foster + Partners Limited** [2017] EWHC 2574 (TCC) where the Defendant's expert was criticised with the judge saying that the expert's approach had "*no intellectual justification whatsoever*" and was "*wholly flawed ... verging on nonsense*".

## Concluding comments

The provisions of CPR 35 and the case law make it clear that having an expert on board is not a straightforward process so the main points to consider are:

- is it necessary to instruct an expert?
- does this expert have the necessary expertise?
- do you have permission from the court for expert evidence? Is that a single joint expert?
- ensure that the instructions are Part 35 compliant
- ensure that the report is all-encompassing as evidence is only given in writing (unless the court has given permission for oral testimony).

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