JUDICIARY OF ENGLAND AND WALES

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FOCUSING EXPERT EVIDENCE AND CONTROLLING COSTS

FOURTH LECTURE IN THE IMPLEMENTATION PROGRAMME

THE BOND SOLON ANNUAL EXPERT WITNESS CONFERENCE

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"The price of wisdom is above rubies."[1]

1. INTRODUCTION

1.1 The text of this lecture is being distributed at the start of this seminar. The paragraphs of this lecture are numbered for ease of reference on future occasions (such as the forthcoming lecture on case management).[2]

1.2 Terms of reference. It will be recalled that my terms of reference for the Civil Litigation Costs Review included a requirement to:
"Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs."

1.3 Role in implementation. I have subsequently been asked to take a proactive role[3] in relation to the implementation of the Costs Review recommendations, following their endorsement by the Judicial Executive Board and their broad acceptance by the Government. This role includes (a) assisting with the drafting of rule amendments and (b) helping to explain the forthcoming reforms to court users. Hence the present lecture.

1.4 Ambit of this lecture. It is now generally accepted that case management has a

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[1] Job, chapter 28, v. 18
[2] To be delivered at University College London on 22nd November 2011
[3] This is subject to the supervision of the Judicial Steering Group, which meets fortnightly and to which I report. The Judicial Steering Group comprises the Master of the Rolls (Head of Civil Justice), Maurice Kay LJ (Vice-President of the Civil Division of the Court of Appeal), Moore-Bick LJ (Deputy Head of Civil Justice) and myself.

valuable role to play in relation to the deployment of expert evidence.[4] There is already much recent guidance on the preparation of expert evidence. See, for example, the helpful guidance given by Arnold J with particular reference to patent cases in *Medimmune Ltd v Novartis Pharmaceuticals UK* [2011] EWHC 1669 (Pat). In this lecture I intend to concentrate on two specific aspects of expert evidence, namely focusing expert evidence and managing the costs of expert evidence.

1.5 Parallel developments in criminal litigation. Currently the main concern in relation to expert evidence in criminal litigation is to ensure that such evidence is reliable. Measures proposed in the Law Commission's recent report[5] are designed to achieve this. There is also, however, increasing concern that expert evidence in criminal trials should be properly focused. The Criminal Procedure Rules seek to secure this.

2. FOCUSING EXPERT EVIDENCE

2.1 Costs Review Final Report. Expert evidence is discussed in chapter 38 of the Costs Review Final Report. The principal theme of this discussion is that courts should make greater use of their existing power to control expert evidence, in particular by identifying the issues which experts should address at an early stage.

2.2 Reactions. Many expert witnesses have expressed strong support for the above proposal.[6] They would welcome directions given by the court at a case management conference identifying the issues upon which their expert opinion is required.

2.3 Benefits. Focused directions by the court at an early stage would bring two benefits: (i) shortening of expert reports; (ii) saving of costs.

2.4 Rule amendments. The Rule Committee has approved a number of amendments to rule 35.4 in relation to expert evidence. These amendments are being held in escrow until the general implementation date for the Costs Review reforms. A copy of rule 35.4 is attached with the forthcoming amendments shown in bold and underlined. See annex 1. The amendments to rule 35.4 (2) (a) and 35.4 (3) are intended to encourage the focusing of expert evidence at an early stage.

2.5 It is to be hoped that lawyers and judges will make full use of these provisions. Also in cases where expert witnesses would appreciate further guidance, they may see fit to draw these provisions to the attention of their instructing solicitors.

2.6 Focusing expert evidence saves time and costs. There are numerous cases where substantial sums have been wasted because the experts – in good faith and with the best of motives – have written lengthy reports which are largely irrelevant or inadmissible. For a recent example of a case in which huge costs were wasted because expert reports were not focused upon the relevant issues, see *Trebor Bassett Holdings Ltd ADT Fire & Security PLC* [2011] EWHC 1936 (TCC), in particular at

[4] See e.g. *Case Management and Complex Civil Litigation* by M. Legg (The Federation Press, Sydney, 2011) at chapter 5, "Expert Evidence".
[5] *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com No 325) 2011, HC 829
[6] For example at an expert evidence seminar in Manchester on 24th May 2011, hosted by BDO.

[396] to [402]. A modest sum spent by the parties on case management at an early stage would avoid this haemorrhage of costs. This is particularly true in construction cases and IT cases, as I discovered during my four years as a judge in the Technology and Construction Court ("TCC").

2.7 Intellectual property litigation. IP litigation is a growth area.[7] Focusing expert evidence on the real issues in such litigation has the potential to save substantial costs. See, for example, *Procter & Gamble Company v Reckitt Benckiser (UK) Ltd* [2007] EWCA Civ 936, [2008] Bus LR 801 and *Dyson Ltd v Vax Ltd* [2011] EWCA Civ 1206.

2.8 Developments in Australia. Judges and practitioners in Australia have devoted much attention and effort to the problem of focusing expert evidence. In Victoria Order 44 of the Supreme Court (General Civil Procedure) Rules 2005 enables the court to "specify the matters on which the experts are to confer" at expert meetings.[8] In heavy cases the parties sometimes use facilitators to chair the expert meetings and produce joint reports identifying the issues on which the experts agree, the issues on which they disagree and the reasons for their disagreement. This procedure was used, for example, in *Aquatec Maxcon Pty Ltd v Barwon Region Water Authority (No. 2)* [2006] VSC 117[9] and *BHP v Steuler* [2009] VSC 322.[10] I am told by experienced Australian practitioners[11] that in heavy and technically complex cases this procedure is beneficial and leads to substantial saving of costs.

2.9 Possible use of facilitators in England and Wales. I do not suggest that English courts should ever compel parties to incur the cost of instructing a facilitator. However, in very heavy construction cases, IT cases or similar, where expert costs may run to six figure sums or more, the parties may wish to consider this procedure as a possible mechanism for limiting expert evidence and controlling the total costs of the exercise. In that event, the parties or the court may wish to consider the Australian experience referred to above and possibly to have a look at the reports of *Aquatec* and *BHP*.

2.10 Personal injury litigation. Expert evidence in personal injury litigation tends to be directed to quantum issues such as the claimant's condition, future prognosis and so forth. It is a fact of life that software systems now play a major part in the assessment of quantum of damages in such cases. This is because those who negotiate settlements in low value claims usually rely upon print outs from systems such as *Colossus* or *Claims Outcome Advisor*. The great majority of PI claims are low value and they almost always settle. Many may deplore the intrusion of computers into the assessment of general damages for pain, suffering and loss of amenity,[12] but this development is not going to be reversed. Obviously if a case goes to court, the judge will assess damages in the normal way. He or she will not rely upon a computer generated assessment. However, it is only in a very small fraction of PI

[7] See Costs Review Final Report, chapter 24.
[8] See rule 44.06 (2).
[9] The facilitator was Geoffrey Markham: see para 69.
[10] The facilitator was Dr Donald Charrett: see para 70.
[11] David Levin QC and Ian Percy of Owen Dixon Chambers, Melbourne told me about the procedure during a construction law conference in Hong Kong and subsequently sent a highly informative paper entitled "Some observations on the use of experts" dated 21st March 2011.
[12] As was made plain during the Costs Review consultation

cases that the assessment of damages is undertaken by a judge.

2.11 Practical implications. In my view there needs to be a uniform calibration of software systems which are used for the assessment of PI general damages. Also the format of medical reports should be harmonised in such a manner that their contents can be rapidly and efficiently fed into the relevant computer systems. See the recommendations made in chapter 21 of the Costs Review Final Report.

2.12 The recommendations in chapter 21 still need to be implemented. Regrettably no success has yet been achieved in (a) developing a uniform calibration of the relevant software systems or (b) developing a common format of medical reports which can be used in conjunction with such software systems. Ideally this work would be undertaken by a joint working group of medical experts and those involved in the settlement of personal injury claims. I hope that there may be experts amongst the audience here today or amongst readers of this lecture who are willing to take up this project and actually make it work.

3. MANAGING THE COSTS OF EXPERT EVIDENCE

3.1 Need for control of expert costs in advance. Job may be right that the price of wisdom is above rubies, but the price of an expert report should not be. The best way to control the cost of expert evidence is by setting a budget in advance. Of course, circumstances may change and the budget may need to be revised. But participants in litigation, like the participants in any other major project, should at all times be working within set financial limits.

3.2 Costs Review Final Report. Chapter 38 of the Final Report recommends that judges should make greater use of their existing power (under rule 35.4 (4)) to limit the recoverable costs of expert evidence in advance.[13] This recommendation meshes in with the emerging procedures for costs budgeting and costs management, which are now being piloted in a number of courts.[14]

3.3 Rule amendment. In order to facilitate the exercise of the court's power to control the cost of expert evidence in advance, rule 35.4 (2) will be amended to require parties at the permission stage to furnish estimates of the costs of their proposed expert evidence. See annex 1. This should not put the parties to additional work or expense. It is inconceivable that either party would wish to instruct an expert witness without first obtaining an estimate of that expert's fees.

3.4 Cases proceeding under the costs management pilots. In cases which are the subject of the current pilots, the parties will have included an estimate of the costs of their proposed expert evidence in their filed budgets: see precedent HA annexed to Practice Direction 51D and precedent HB annexed to Practice Direction 51G. Therefore amended rule 35.4 (2) imposes no additional obligation upon these parties.

3.5 Effective costs budgeting entails that the expert and the lawyer together, at the

[13] See chapter 38, para 3.18
[14] The Mercantile Courts, the TCC and (re defamation cases only) the QBD in London.

start of the retainer, make a realistic appraisal of what work the expert will have to do, how long it will take and what is reasonable remuneration for that work. This exercise will be easier if the issues to be addressed in expert evidence are identified at an early stage, as suggested in section 2 above.

4. USE OF CONCURRENT EXPERT EVIDENCE AT TRIAL

4.1 The Australian courts have developed a procedure at trial whereby experts in any discipline give their evidence simultaneously, the format being a discussion chaired by the judge with counsel putting questions when permitted by the court.[15] During the course of the Costs Review, I discussed this procedure with Australian judges and practitioners. The general view is that this procedure is beneficial for four reasons:

(i) The procedure is quicker and more focused than the traditional sequential format.

(ii) Experts find this procedure easier; they give evidence better and sometimes more impartially than under the traditional sequential format.

(iii) Judges find it easier to understand complex technical evidence when it is given in this way.

(iv) The procedure achieves a significant saving of both trial time and cost.

4.2 Arbitration. The concurrent evidence procedure has been used for many years in arbitrations, especially international arbitrations. Arbitrators, practitioners and experts all tell me that it works well and is effective.

4.3 Pilot. The concurrent evidence procedure is being piloted in the Manchester specialist courts on a voluntary basis. The guidelines for that pilot are attached as annex 2. Although originally limited to the Mercantile Court and TCC in Manchester, it has now been extended to the Manchester Chancery Court. Early feedback from this pilot suggests that the procedure is beneficial for broadly the same reasons as set out in para 4.1 above.

4.4 Objective. It is hoped that, in those few cases which go to trial, the concurrent evidence procedure will become an additional tool for focusing and controlling the costs of expert evidence.

4.4 Possible rule amendment. It is possible that by October 2012 Part 35 or its accompanying practice direction will be amended to permit concurrent evidence to be used when the judge so orders.

4.5 In which cases should the judge so order? It will be a matter for the discretion of the judge whether he adopts this procedure in any given case. It will be suitable for many cases in which there are opposing reports written by reputable experts, who practise in the same field. Valuation evidence may be particularly well suited to this

[15] For a recent and succinct account of the concurrent evidence procedure used in an admiralty case before the Federal Court of Australia, see the judgment of Rares J in *Strong Wise Ltd v Esso Australia Resources Pty Ltd* (2010) 267 ALR 259; [2010] FCA 240 at para 95.

procedure.[16] Recent Australian experience suggests that the procedure may be suitable for wide range of expert evidence. However, the procedure should not be undertaken unless the judge has time to master the expert reports properly.

4.6 At what stage should the judge so order. Ideally the possibility of using the concurrent evidence should be flagged up at the first case management conference, even if no direction to that effect is given at such an early stage. The final decision whether to adopt this procedure is best made at the pre-trial review, although it could be made at the start of the trial.

Rupert Jackson 11th November 2011

[16] This is the field in which the procedure was originally deployed by Australian judges.

ANNEX 1

RULE 35.4 OF THE CIVIL PROCEDURE RULES WITH AMENDMENTS APPROVED BY THE RULE COMMITTEE BUT HELD IN ESCROW SHOWN UNDERLINED AND IN BOLD

35.4

(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.**

(3A) Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.

(Paragraph 7 of Practice Direction 35 sets out some of the circumstances the court will consider when deciding whether expert evidence should be given by a single joint expert.)

(4) The court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party.

ANNEX 2

GUIDELINES FOR THE VOLUNTARY PILOT OF THE TAKING OF CONCURRENT EXPERT EVIDENCE IN SUITABLE CASES IN THE MANCHESTER TCC AND MERCANTILE COURT COMMENCING Monday 21 June 2010 (manchesterpilotguidelines1)

Introduction

1. These guidelines set out (a) the procedure to be adopted when determining whether a case is suitable for a Concurrent Expert Evidence Direction ("CEED"), (b) the procedure to be adopted prior to trial where a CEED is made and (c) the procedure to be adopted at the trial itself.

Identifying a suitable case

2. In relation to a new case, consideration should be given to the suitability of a CEED at the first or subsequent CMCs. In relation to existing cases, either party may apply to the Court for a CEED or the Judge may of his own motion invite consideration of it and convene a hearing for that purpose. In cases approaching trial, this may be done at the PTR. In any case where the Judge has not invited consideration of a CEED, either party may apply to the Court for such consideration to be given. In an appropriate case, where the Judge makes pre-CMC directions, those directions may include a request that the parties consider the appropriateness of a CEED for that case.

3. In considering whether or not to make a CEED, the following factors will be of particular relevance:

   (1) The number, nature and complexity of the issues which are or will be the subject of expert evidence ("expert issues"); there is, however, no presumption that a CEED is appropriate only where the expert issues are complex or unusual;

   (2) The importance of the expert issues to the case as a whole; there is, however, no presumption that a CEED is appropriate only where the expert issues are of central importance;

   (3) The number of experts, their areas of expertise and their respective levels of expertise;

   (4) The extent to which use of the concurrent evidence procedure is likely to:

(a) Assist in clarifying or understanding the expert issues, or any of them; and/or

(b) Save time and/or costs at the hearing;

(5) Whether there is any serious issue as to the general credibility or independence of one of the experts; if there is, a CEED is unlikely to be suitable.

4. A CEED may only be made by the Judge (a) after hearing submissions from the parties and (b) with their consent.

5. The CEED shall state that the oral evidence of the experts at trial shall be given concurrently, identifying the expert issue(s) and the experts to which it is to apply.

Pre-trial Procedure where a CEED has been given

6. The Court will make the usual directions as to the service of expert reports.

7. The Court will also make a direction for a meeting of experts and the provision of a joint statement pursuant to CPR 35.12 ("the Joint Statement"). However, in relation to the areas of disagreement, the statement should identify each area clearly and separately, by reference to a heading and number in the list of such areas. Each expert's position in respect such an area shall be set out, together with the reasons therefor. If the expert is relying on reasons given in the report already served, a clear cross-reference to the relevant part must be given.

8. Prior to the trial the parties shall produce an agreed agenda for the taking of the concurrent expert evidence based upon the Joint Statement ("the Agenda"). This will contain a numbered list of the issues where the experts disagree. It must be provided in sufficient time to enable the Court to consider it properly and if possible, by the PTR.

Procedure at trial where is CEED has been given

9. The final form of the Agenda will be decided at the PTR or the trial by the Judge after hearing from the parties. The Judge may re-order, revise or supplement it. The Agenda should then be reduced into writing and made available to the experts before they give their evidence.

10. At the appropriate time, the experts who are to give their evidence concurrently will each take the oath or affirm and then take their place at the witness table.

11. Before the evidence starts, and after hearing from the parties, the Judge will identify to the experts any significant factual matters or issues which have arisen in the trial thus far and which may affect their evidence.

12. Subject to any further direction the experts will address the issues in the order in which they appear in the Agenda.

13. In relation to each issue to be addressed,

    (1) The Judge will initiate the discussion by asking the experts, in turn, for their views. Once an expert has expressed a view the Judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the Judge will invite the other expert to comment or to ask his own questions of the first expert;

    (2) After the process set out in paragraph (1) above has been completed for all the experts, the parties' representatives will be permitted to ask questions of them; while such questioning may be designed to test the correctness of an expert's given view, or seek clarification of it, it should not cover ground which has been fully explored already. In general a full cross-examination or re-examination is neither necessary nor appropriate;

    (3) After the process set out in paragraph (2) above has been completed, the Judge may seek to summarise the experts' different positions on the issues, as they then are, and ask them to confirm or correct that summary.

14. It is highly desirable that the parties agree in advance that a transcript of the expert evidence be obtained and provided to the Judge in all but the simplest of cases.

Data for the Pilot Study

15. In order to obtain the material needed for an evaluation of the pilot,

    (1) Judges will complete a suitable form

        (a) Explaining why a CEED was made in that particular case and

        (b) In the event that concurrent evidence was actually given at the trial, how helpful, or otherwise, the process was to the parties and the Court, and in what way;

    (2) The parties in such a case will be invited to give their own evaluation on a suitable anonymous basis, and

(3) The experts concerned will also be invited to give their views on a similar basis.
