



THE EXPERT WITNESS INSTITUTE NEWSLETTER

Case Notes – Autumn 2008

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AS AND ANOTHER (LIBYA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT
[2008] EWCA Civ 289

In this case, the Court of Appeal has considered the approach of first instance courts and tribunals to opinion evidence from governmental sources. The question arose during the Home Secretary's appeal from the Special Immigration Appeals Commission (*SIAC*) against its quashing of a deportation order. *SIAC* had heard the expert evidence of a retired diplomat employed as a consultant to the Foreign and Commonwealth Office (*FCO*); he outlined both his own personal views and the position of the *FCO*. *SIAC* accepted much of the expert's evidence, but not all. The Home Secretary argued that on national security issues, *SIAC* should defer to the views of the *FCO*, as its experience and understanding of such sensitive matters was superior to that of the courts.

The Court of Appeal rejected this argument: the issues on which the expert evidence was submitted were indeed justiciable questions. The real question was "*whether [SIAC] was entitled to reach its own conclusion*" based on the expert's evidence. It was decided that no matter how honest, experienced or compelling an expert witness, a court was nonetheless entitled to choose not to follow his opinion. The expert's role was to provide an opinion on the facts: the court's was to reach a judgment on the law.

In dismissing the Home Secretary's appeal, the Court of Appeal ruled more widely on expert evidence. The Court observed that in reaching their decisions, courts and tribunals had to consider all the relevant evidence, including that of expert witnesses. This required the courts to have regard to the expert's particular experience and expertise. The Court emphasised that as long as the expert's evidence was weighed according to his expertise, a court was "*in no way bound to accept every part of his evidence, provided that it gives rational reasons for not doing so.*" In this particular case, the Court of Appeal was confident that *SIAC* "*approached his evidence entirely properly and appropriately*": it had weighed the evidence and, where it rejected evidence, it had given adequate reasons.

Expert witnesses may draw comfort from the example in this case. Both *SIAC* and the Court of Appeal praised the expert's integrity and expertise, and yet nonetheless neither followed his opinion in every matter. The decision clearly demonstrates that a refusal to follow the expert's every opinion in no way undermines the expert personally.

OWEN PELL LIMITED v BINDI (LONDON) LIMITED (2008) QBD (TCC), 19 MAY 2008;
AND

HOMEPACE LIMITED v SITA SOUTH EAST LIMITED [2008] EWCA CIV 1

The High Court has recently considered the role of experts, acting, not as witnesses in court cases, but as decision-maker in ‘expert determinations’. Expert determinations are a method of alternative dispute resolution that sit outside the arbitral and judicial processes. Where a dispute arises over a technical issue, the parties may agree, that rather than taking the matter to court, they will instruct an expert to settle certain issues. There is no standard procedure: rather, the agreement between the parties governs the entire process. The issues at stake and the way in which the expert must reach and explain his conclusions are all set out in that agreement, which the expert must then follow rigorously. The process is a less formal, less expensive, non-adversarial alternative to a trial, in which the expert’s role is not to contribute evidence as a witness, but to act as the sole arbiter of the outcome. In both *Owen Pell* and *Homepace*, the High Court outlined the principles applicable to expert determinations and considered the extent to which they could be legally binding.

The fundamental principle is that the process is governed by the agreement between the parties. This leads to some consequences which may surprise experts who are more familiar with appearing as witnesses in judicial proceedings. For instance, *Owen Pell* confirmed the well-established principle that the expert determination procedure is not subject to the rules of natural justice (such as the right of one party to address the evidence and allegations of another). Instead, the rules that apply are those established in the agreement.

Further, although with judicial proceedings the appeal process may be a protracted and expensive affair, there is at least the comfort that justice will be done and that its miscarriage may be rectified. There is no such safety net for the aggrieved party in an expert determination. In *Owen Pell*, any appeal of the determination had been expressly excluded in the agreement: the parties had agreed that the decision would be binding and that there would be no recourse to a subsequent tribunal. The affair appeared in court nonetheless, because the defendant had refused to make the payment awarded by the expert: the claimant brought an action to recover the sums owed.

The court found no evidence of bias and therefore refused to interfere with the expert’s determination. The ruling in this recovery action emphasises that the grounds for appealing a decision are highly limited, and confirms that various flaws which would render a judicial decision appealable do not have the same effect in expert determinations. For instance, the expert may give insufficient reasons and even make substantial errors but his conclusion will still bind the parties. *Owen Pell* outlined the only three situations in which an expert’s decision would not be binding: 1) where there is evidence of fraud, 2) where there is evidence of bias, or 3) where an expert has not followed his instructions. In considering this latter question, the Court of Appeal in *Homepace* reversed an expert determination because the expert had answered a different question to that which he had been instructed to determine.

Owen Pell and *Homepace* highlight the importance of an expert ensuring that the agreement which governs the entire process is clear. Any deviation from the agreement could expose his decision to judicial scrutiny. Although the expert's roles as a decision-maker in expert determination and as a witness in court proceedings are entirely separate, if his integrity or professionalism are brought into question in the sphere of expert determinations, this may also impact upon his reputation as an expert witness in court proceedings.

The expert must therefore be sure that he receives full and unequivocal information on the extent of his mandate. The expert should ask the parties to cover expressly in the agreement points such as the issues to be examined, the process to be followed, any deadlines for submitting evidence or reaching a decision, whether and to what extent either party may respond to the other side's evidence, and whether the decision is to be supported by written reasons. It may also be advisable for him to consider raising with the parties the question of whether they want to be able to challenge his decision; while there are sound commercial reasons for wanting the certainty of a binding decision, the parties must be aware that if the agreement does not expressly state that the determination should be appealable, the court will not imply in such a term. As *Owen Pell* reminds us, there will then be very limited circumstances in which the parties can challenge the decision after the process is over.

AHARI V BIRMINGHAM & SOLIHULL HOSPITALS NHS TRUST [2008] ALL ER (D) 09 (APR)

A judgment from the Employment Appeal Tribunal has held that the rule granting an expert immunity from suit applies not just in courts, but also to evidence submitted before to the 'fitness to practice' panel of the General Medical Council (**GMC**). The immunity principle has been applied to other statutorily-established disciplinary bodies such as that of the Metropolitan Police; *Ahari* adds to the momentum in favour of its extension to witnesses appearing before other professional disciplinary panels if they too satisfy the definition of 'quasi-judicial' entities.

The judge reiterated the public policy argument in favour of ensuring that a witness should be able to give his testimony free from fear of later actions; he held that the expert in question was to be protected by immunity from claims arising from his evidence to the GMC. The judge also commented that he felt there to be no difference between the immunity granted to a lay witness and that which protected an expert witness.

The claimant argued that witnesses before the GMC enjoyed immunity "*in the absence of fraud, collusion or malice.*" The claimant asserted that the expert witness had given evidence maliciously and therefore his immunity should be lost. The judge rejected this argument without hesitation, and appeared to state that witnesses in all judicial or quasi-judicial proceedings would be granted absolute immunity from suit.

If an expert witness is instructed to give evidence to a body which has not been explicitly held to be a quasi-judicial body, the witness may consider the test which is applied to determine those entities which are quasi-judicial: 1) is it a tribunal recognised by law? 2) is the nature of the issue akin to a civil or criminal issue between adversarial parties in the courts? 3) is there a similar procedure in a court of law?, and 4) is the outcome a binding determination of the civil rights of the parties? If this test is satisfied, the expert will probably be protected from subsequent suit.

SAUNDER V BIRMINGHAM CITY COUNCIL [2008] ALL ER (D) 275 (MAY)

Another recent ruling in the Employment Appeal Tribunal examined two issues surrounding the evidence of expert witnesses. The first issue was that of bias, while the second question considered whether a party could introduce further evidence from a second expert in circumstances where a single joint expert had already reported.

The claimant in *Saunder* alleged that the single joint expert witness, who had been appointed by the court, was biased. There had traditionally been no test as such for bias in an expert witness, until a case in 2000 extended to its expert the test for bias in a court. This test asked was “*whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*” The claimant in *Saunder* thus sought to argue that the allegation of bias against the expert should be assessed on this basis.

His Honour Judge Peter Clark rejected the argument and confirmed instead the classic statement of the duties of an expert witness, as found in the case of *The Ikarian Reefer* [1993] 2 Lloyds Rep 68. The key duty in the instant case was to give an objective, unbiased opinion on matters within his expertise; the judge felt that any failure by an expert witness to fulfil that obligation would be taken into account by the court in considering his evidence. An appearance of bias would not act to disqualify the expert’s testimony altogether, but it would detract from the weight which a court would afford it in assessing all the evidence.

The judge went on to consider Lord Woolf’s analysis of whether a second expert may be instructed in circumstances where a single joint expert has already reported. Lord Woolf emphasised that the overriding objective of the Civil Procedure Rules required that cases be dealt with justly: therefore if it would be unjust not to allow a party to call further evidence, the party must be allowed to do so. He observed that “*the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert, or, if appropriate, to rely on the evidence of another expert.*” Ideally the report of one expert would suffice, but the court has discretion to allow further evidence to be adduced if the cost so incurred is not disproportionate to the sums in issue. His Honour Judge Peter Clark also noted further factors to consider, as enumerated in a later case. These include the nature of the issues, the importance of the issues, the number of issues, the reasons the new expert is wanted, the effect on the conduct of the trial and the delays caused by the application to appoint a second expert, the expert’s instruction and reporting. In *Saunder*, the judge felt that the acquisition of further evidence was merited, both because the issue in question affected substantially the amount of compensation and because the serious allegation of racial bigotry which had been levelled at the court-appointed expert cast doubt upon the existing available evidence.