PRIVILEGE FOR EXPERTS' DISCUSSIONS: TIME FOR A RE-THINK?

TECBAR Seminar 24 November 2022

1. The trigger for my contribution to this Seminar has been the helpful and thorough judgment of H.H. Judge Paul Matthews in *Pickett v Balkind* [2022] EWHC 2226 (TCC) concerning the role of lawyers in joint experts meetings. There are three areas I will eventually discuss (eventually because there is quite a lot of groundwork to cover first);

   (1) What are the implications of "without prejudice" in this context?

   (2) What is the extent, if any, of privilege for lawyers' involvement in that process, and what should be the extent of that privilege?

   (3) Some thoughts about the spill-over of English procedures into international arbitration.

First, a little historical reflection

2. When I first came to the Bar, back in the very distant mists of time, exchange of experts' reports was a very recent development: indeed not long before I came into chambers, one of the silks in chambers turned up at court to find that the other side's expert orthopaedic surgeon who he was

expected to cross-examine was no other than his own father! Obviously had reports been exchanged his surprise would or should have avoided.

3. When Lord Woolf reviewed civil procedure as long ago as 1995 (his interim report) and 1996 (his final report) he was very critical of the use of expert witnesses in civil litigation. In his interim report, he pointed out that the excessive cost and the delays associated with each party appointing their own experts and he recorded concerns expressed about the failure of experts to maintain their independence from the party by whom they had been instructed[1]. In his final report he spoke of the "large litigation support industry, generating a multi-million pound fee income" which had grown up".

4. Nothing in that respect has reduced the fee income litigation support industry in the intervening 27 years – one part of that industry, the delay experts, may be watching with great care the fall out from the decision about which Lucy Garrett is going to talk next.

[1] Interim Report to the Lord Chancellor on the civil justice system of England and Wales (June 1995), chapter 23

5. At any rate, whilst Lord Woolf initially leant towards recommending that the court should appoint a single expert witness over the heads of the litigating parties, he softened his recommendation in his final report.[2]

6. His report led to the adoption of struct rules in Part 35 of the Civil Procedure Rules to regulate the giving of expert evidence.

CPR etc.

The CPR

7. Part 35 sets out in detail the rules which experts and those instructing them must abide by. The particularly relevant provisions are as follows:

8. CPR 35.3.1 "*It is the duty of experts to help the court on matters within their expertise.*"

9. CPR 35.3.2 "*This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.*"

10. CPR 35.3.4 "*Experts must ensure that their evidence is independent, impartial and objective.*"

11. CPR 35.12.2 "*The court may specify the issues which the experts must discuss.*" The White Book commentary refers to the case of *BDW Trading Ltd v Integral Geotechnique Ltd* [2018] EWHC 1915 (TCC). A solicitor can in very narrow circumstances look at a draft expert report and make changes so long as they do not alter the substance and any changes are made transparently with knowledge of the court and the other side.

[2] Final Report to the Lord Chancellor on the civil justice system of England and Wales (July 1996), chapter 13

12. CPR 35.12.5 "*Where the experts reach agreement on an issue during their discussions the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.*"

The White Book commentary notes that "in practice, however, it could be very difficult for a party dissatisfied with an agreement reached at an experts' discussion, to persuade the court that this agreement should, in effect, be set aside unless the party's expert had clearly stepped outside their expertise or brief, or otherwise have shown themselves to be incompetent."

13. 35PD.2 2.1 "*Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.*

2.2 *Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate*."

14. 35PD.9 9.4 "*Unless ordered by the court, or agreed by all the parties, and the experts, neither the parties nor their legal representatives may attend experts discussions."*

15. 35PD.9 9.5 *"If the legal representatives do attend –*

(i) *They should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and*

(ii) *The experts may if they so wish hold part of their discussions in the absence of the legal representatives*.

…

9.7 *Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.*"

16. The Civil Justice Council Guidance for the Instruction of Experts in Civil Claims 2014 ("EG") is appended in the White Book and adds some additional material.

17. 35EG.3 "A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."

18. 35EG.18: 65 "Experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views on the opinions and contents of their reports and not include any suggestions that do not accord with their views."

66 "*Where experts change their opinion following a meeting of experts, a signed and dated note to that effect is generally sufficient. Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons.* ***Those instructing experts should inform other parties as soon as possible of any change of opinion.*****"**

<u>Bar Council Guidelines</u>

19. *"30. It is standard practice in civil cases for barristers to be involved in discussions with experts and to consider drafts of the expert's report prior to service of the report on the other side. In this connection, counsel has a proper and important role in assisting an expert as to:*

30.1 The issues which the expert should address in his or her report;

30.2 The form of the report and any matters which are required by the rules of court to be included in it; and

30.3 Any opinions and comments which should not be included as a matter of law (e.g. because they are irrelevant or go beyond the expert's experience and expertise)."

20. Beyond this, however, the courts have repeatedly emphasised that expert reports should be, and should be seen to be, the independent product of the expert in question *The Ikarian Reefer* [1993] 2 Ll Rep. 68 at 81; Practice Direction - Experts and Assessors, para. 1.2; Queens Bench Guide para. 7.8; Admiralty and Commercial Court Guide, para. H.2; Chancery Court Guide 2016, para. 17.47. **Accordingly, one should not seek to draft any part of an expert's report. Counsel's involvement may, however, include discussing or annotating a draft report with observations and questions for the expert to consider in any revisions to the draft. These comments might include assisting an expert to use plainer language, so that the expert's views are expressed accurately and clearly**. When doing this, however, one must keep in mind one's obligations under Rules C9.2(d), C9.3 and C9.4.

…

33. **However, one must take great care not to do or say anything which could be interpretated as manufacturing or in any way influencing the content of the evidence that the expert is to give in the witness box."**

SRA guidance

21. This guidance sets out that "Solicitors who are complicit with their client in misleading the court, or who do so themselves, risk serious consequences. The courts have made it very clear that they regard this as "one of the most serious offences that an advocate or litigator can commit". Examples include… attempting to convince expert witnesses to alter their reports for the benefit of a solicitor's client."

TCC Guide

22. 13.5.2 *"In many cases it will be helpful for the parties' respective legal advisors to provide assistance as to the agenda and topics to be discussed at an experts' meeting. However, (save in exceptional circumstances and with the permission of the judge) the legal advisors must not attend the meeting. They must not attempt to dictate what the experts say at the meeting".*

23. 13.6.3 *"Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement.* ***Any such concern should be raised with all experts involved in the joint statement****."*

24.13.7.1 *"It is the duty of an expert to help the court on matters within his expertise. This duty overrides any duty to his client: CPR 35.3. Each expert's report must be independent and unbiased."*

13.7.2 *"The parties must identify the issues with which each expert should deal in his or her report. Thereafter, it is for the expert to draft and decide upon the detailed contents and format of the report, so as to conform the Practice Direction supplementing CPR Part 35 and the Protocol for the Instruction of Experts to give Evidence in Civil Claims. It is appropriate, however, for the party instructing an expert to indicate that the report (a) should be as short as is reasonably possible; (b) should not set out copious extracts from other documents; (c) should identify the source of any opinion or data relied upon; and (d) should not annex or exhibit more than is reasonably necessary to support the opinions expressed in the report.* ***In addition, as set out in paragraph 15.2 of the Protocol for the Instructions of Experts to give Evidence in Civil Claims, legal advisors may also invite experts to consider amendments to their reports to ensure accuracy, internal consistency, completeness, relevance to the issues or clarity of reports****."*

Chancery Guide

25.9.29 *"Unless the court orders otherwise, the structure and content of the joint meeting (or meetings) are matters solely for the experts and should not be controlled by the parties. The meetings may be held in person or remotely, as the experts find most convenient."*

26.9.32 *"The joint statement is to be the work of the experts alone. Whilst the parties' legal advisers may assist in identifying issues which the statement*

should address, they must not be involved in either negotiating or drafting the statement."

27. 9.33 *"The experts may provide a draft of the joint statement to the parties' legal advisers, but the legal advisers should not suggest amendments to the draft statement save in exceptional circumstances, for example where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement, where a party has sought to introduce new issues into a statement which were not in the agreed list of issues to be addressed by the experts or were not in their report, or where issues have been overlooked by the experts."*

Commercial Court Guide

28. H2.16 *"The sequential exchange of expert reports may in many cases save time and costs by helping to focus the contents of responsive reports upon actual rather than assumed issues of expert evidence and by avoiding repetition of detailed introductory or explanatory material. On the other hand, it may encourage the expert whose report is served to focus to excess on seeking to challenge the report served first rather than on assisting the Court."*

29. H2.22 *"Subject to any directions of the Court, the procedure to be adopted at a meeting of experts is a matter for the experts themselves, not the parties or their legal representatives."*

30. H2.23 *"Neither the parties nor their legal representatives should seek to restrict the freedom of experts to identify and acknowledge the expert issues on which they agree at, or following further consideration after, meetings of experts."*

King's Bench Division Guide

31. 10.41 *"The duty of an expert called to give evidence is to assist the court. This duty overrides any obligation to the party instructing them or by whom they are being paid: see rule 35.3(2) and para 4.1 of the Protocol for the instructions of experts to give evidence in civil claims…"*

32. 10.51 *"Permission must be sought to rely on an expert in substitution for an expert for whom permission has been earlier obtained. "Expert shopping" is to be discouraged and good reason is required. The court may, depending on the circumstances, require disclosure of an earlier expert's report as a condition of giving permission for a subsequent expert."*

33. 10.52 *"Written questions (which must be proportionate) may be put once only to an expert within 28 days after service of their report, and must be for purposes only of clarification of the report. Questions going beyond this can be put only with the agreement of the parties or the Master's permission. The procedure of putting written questions to experts is not intended to interfere with the procedure for an exchange of professional opinion in discussions between experts or to inhibit that exchange of professional opinion. If questions that are oppressive in number or content are put, the court is likely to disallow the questions and make an appropriate order for costs against the party putting them."*

Is there a problem?

34. If recent case law is any guide, the answer is a clear "Yes".

35. Starting with *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) the Defendant's expert first revealed in cross-examination that he had sent a first draft of the joint statement to the Defendant's solicitors. Based on the feedback he had made some changes to the draft based off that one instance (para 16).

36. The judge stated that this was a "serious transgression" of CPR 35PD para 9. The rule was set out clearly:

"18. ... it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. That is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12 (5)). There may be cases, which should be exceptional, where a party or Its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party

dissatisfied with the content of the joint statement to seek to reopen the discussion by this means." (*my emphasis added*)

37. However, the judge concluded that the expert was genuinely unaware that this conduct was inappropriate and the limited changes had not modified the substance of the opinion.

38. The White Book makes specific reference to this case at CPR 35.12.2 noting that whilst this judgment was based in part on certain provisions in the TCC Guide it would appear to constitute good practice of more general application.

39. In the very recent case of *Andrews v Kronospan* [2022] EWHC 479 (QB) the Claimants' solicitors accepted that there were at least 16 comments relating to "advice or suggestions as to content" (para 26) over a continuous period. The expert had also blind copied the solicitors into correspondence with the other expert (para 27). The judge termed these "serious transgressions". The Defendant's solicitors and their expert did not know these discussions were occurring.

40. The judge concluded from the correspondence that the expert's approach "strongly suggests that he regards himself as an advocate for the Claimants, rather than as an independent expert whose primary obligation is to the court" before finding that "the court has no confidence in [the expert's] ability to act in accordance with his obligations as an expert witness" (para 31). The judge also noted that where the subject matter is of a very technical nature it is particularly important that it is untainted by subjective considerations (para 34).

41. The judge revoked the Claimants' permission to rely on the expert's evidence, but allowed another expert to be instructed.

42. In another TCC case, the Court considered multiple serious transgressions, across multiple experts, on multiple occasions in *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC). Following concerns raised by Dana about which documents had been provided to experts, it became apparent that as the Claimant put it there had been "a free flow of information between the [solicitors] and its Experts without any gatekeeping role on the parts of the [solicitors] and that this free flow of information appeared to have been taking place between the time of the joint expert meeting and the signing of the experts' Joint Statement… when the Experts should have been in "purdah"…and should not have been communicating directly with their clients." (para 18).

43. Further examples of allegations of impermissible interference in the production of expert joint statements and review of the principles are set out in *Wired Orthodontics Limited v HMRC* [2020] UKFTT 0290 (TC), a Tax Chamber case.

44. The courts have specifically referred to the "worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties." (*Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* (No. 2 Costs) [2021] EWHC 1414 (TCC), para

38). Fraser J. made it clear that in appropriate cases failure to observe the rules might lead to the award of indemnity costs (see para 40).

45. Lord Hodge both in a speech delivered in the Middle Temple in 2017, and more recently at the Expert Witness Institute's annual conference in May 2021, directly addressed the fact that experts "must not allow their instructing solicitors, by whom they are paid, to call the tune." He made reference to a 2019 survey of expert witnesses, which found that 41% of respondents indicated that during the preceding 12 months they had come across an expert witness who they considered to be a hired gun." "25% of respondents further reported that they had been asked or felt pressurised to change their report by an instructing party in a way which damaged their impartiality."[3]

46. This is a pretty impressive list of concerned judges in multiple jurisdictions. For my part, my involvement as counsel in cases in recent years has principally been in connection with international arbitrations where some very remarkable changes in joint statements have been observed by me which appeared to be only explicable by an expert going back to the expert's instructing lawyers and changing the draft following discussions.

47. To the list of cases above in which concern has been expressed, can now be added the decision of H.H. Judge Matthews in *Pickett v Balkind* [2022] EWHC 2226 (TCC) to which I referred at the beginning of this talk.

[3] Transcript of Lord Hodge's speech in 2017: https://www.supremecourt.uk/docs/speech-171009.pdf- This appears to be the report Lord Hodge was referring to in his 2021 speech: https://www.bondsolon.com/media/169523/expert-witness-survey-report-2019.pdf A summary of Lord Hodge's 2021 speech: https://www.ewi.org.uk/what-the-court-expects-of-a-competent-expert-witness

48. There the fact that experienced solicitors and counsel had not complied with the TCC Guide only emerged because accidental disclosure of a letter between an expert and his instructing solicitors revealed the extent of the instructing solicitor's suggestions as to the contents of a joint statement.

Why do these problems arise?

49. The rules are clear. Why then are experienced solicitors and counsel continuing to walk a finely balanced line and get involved in these discussions?

50. I suspect that all of us in this room have at one time or another had to deal with an expert changing opinions with disastrous consequences for our client's case. A case in which I was involved was the Supreme Court case of *Jones v Kaney* where the allegation of negligence against the defendant was in effect that the expert had made a negligent mess of the joint statement process, giving way to a more experienced and wilier expert engaged by the defendant in a personal injury case.

51. Taking the back seat in these discussions is not easy. The rules state that anything agreed by the joint experts does not bind the parties. The reality, as the White Book Commentary recognises, is that the court will undoubtedly give such agreement weight and it will be hard for parties to row back from that position. The court in *Wired Orthodontics Limited v HMRC* [2020] UKFTT 0290 (TC) noted this practical reality deeming it an "interesting perspective" at para 75. The concern that a case might fall apart after an expert makes a concession is a real one.

52. Part of the logic for the without prejudice rule, in the broad context of party negotiations is as set out in *Ofulue v Bossert* [2009] 1 A.C. 990, approving *Unilever v Procter & Gamble* [2000] is to allow parties to "speak freely" without lawyers hovering over their shoulders. The same spirit applies to the reasons for without prejudice protection in the expert setting and to the overarching purpose of the expert meeting, as the White Book commentary confirms (*Wired Orthodontics Limited v HMRC* [2020] UKFTT 0290 (TC), para 74).

53. This is why agreeing the agenda has now become such a pressure point. Whilst the parties are not strictly bound by the agreements in the joint statement it seems that the court is unlikely to be persuaded that both the experts actually are wrong.

54. An effective joint statement is best achieved by parties agreeing a single agenda for the experts' discussion (*Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 (QB), para 35).

55. Criticism of "overly lawyered" agendas (*Aderonmu v Colvin* [2021] EWHC 2293 (QB), para 77) demonstrates that the courts are alive to the attempt to move the battleground forward and influence experts at this stage instead. The solution is not to move the cross-examination to the joint agenda. As the judge noted, a joint statement is "for the benefit of the court and should not be a proving ground for the parties' respective cases".

56. There are narrow circumstances where lawyers might be permitted to see the joint statement to ensure that there is not a misunderstanding of the law or fact. However, if any issue is raised, it needs to be done transparently,

involving both experts, parties and the Court. It is not an opportunity to influence the substance of the joint statement. (*BDW*).

57. Naturally, not all areas of the law follow the same model. Patent law is an area in which the courts have specifically said that considerable assistance from the lawyers is needed in drafting their report, amounting to an "iterative process through a number of drafts" (*MedImmune v Novartis Pharmaceuticals UK Ltd* [2011] EWHC 1669 (Pat), paras 110 – 114).

58. Hale LJ (as she then was) drew from her experience in the family courts in the judgment of *Hubbard v Lambeth, Southwark and Lewisham HA* [2001] EWCA 1455 22. In that case the court refused to order the parties' lawyers to attend the experts' discussions, with an expectation that the parties' experienced lawyers would produce well-drafted agendas instead. Hale LJ suggested that the parties consider the appointment of an independent legally qualified person to chair an experts' discussion as in the family courts.

59. The Chancery Guidance and CPR 31.15 sets out provision for an "assessor" who is a "statutory court-appointed expert". Stepping back this might be a better solution to the entangled model presently used, but in practice at present this is used rarely.

The opportunity to change the expert

60. The credibility of an expert witness will be damaged where the expert signs a joint statement and then subsequently retracts it. In one such case, the judge found that the retraction had "plainly damaged his credibility as an expert witness… At best, [he] had been careless: at worst, he ran the risk of being accused of tailoring his evidence to fit in with [the] case" (*Denton Hall Legal Services v Fifield* [2006] EWCA 169, para 27).

61. It is a well-established principle that expert shopping is generally to be discouraged (*Beck v The Ministry of Defence* [2005] 1 WLR 2206). It flows from this that a party will not be able to replace its expert if it turns out that they have made a crucial agreement save in very narrow circumstances. To allow otherwise gives parties a second bite at the cherry. This was considered in *Fernandez v Iceland Foods* [2021] EWHC 3723 (QB) and in *Hinson v Hare Realizations* [2020] EWHC 2386 (QB), para 21.

62. I now turn to the three areas which I referred to at the beginning.

What is meant by "without prejudice" in this context?

63. There is no room for doubt: the "without prejudice" reference is to the discussions between experts, and is, as set out above, intended to encourage experts to reach agreements.

64. There is of course a wide range of matters upon which experts are called upon to hold discussions. For example, accountants or quantity surveyors may be called upon to agree arithmetical calculations, often of great complexity, where the rules of mathematics permit of only one answer.

65. However in practice there are many discussions where experts are meeting to seek to reach agreement in respect of matters where a competent expert might hold a view within a range of views.

66. In my experience in this territory there are many of my colleagues at the Bar and many solicitors who think that this permits or perhaps even

requires the experts to bargain with each other to reach an agreed conclusion.

67. I have considerable doubts as to whether that is appropriate. However, what I am sure about is that for experts to do what they often do which is to report back to their instructing lawyers with a situation report on those discussions as though they are negotiations invites intervention from the instructing lawyers.

68. It may be that the problem arises in part because lawyers engage in "without prejudice" discussions in the context of negotiating on behalf of clients and the use of the phrase in respect of experts' discussions may trigger a sort of Pavlovian reaction as to what that expression means in the context of experts meeting.

69. However that may be, it seems to me that the problems might be avoided or at least mitigated by a clear understanding that any communications between lawyers and experts should be copied to the all relevant parties, and therefore be available to the Court in due course.

70. This leads me to my second topic:

What is the extent, if any, of privilege for lawyers' involvement in that process, and what should be the extent of that privilege?

71. In my experience suggestions from instructing lawyers to experts are not generally the subject of open correspondence. This seems to me to be a clear breach in TCC cases of Paragraph 13.6.3 of the TCC Guide:

"Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. ***Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concern should be raised with all experts involved in the joint statement.***

72. It will be recalled also that the Civil Justice Guidance ("EG") advises:

"*Where experts change their opinion following a meeting of experts, a signed and dated note to that effect is generally sufficient. Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons.* ***Those instructing experts should inform other parties as soon as possible of any change of opinion.*****"**

73. Again, this guidance appears to me to make it clear that the process of joint statements should be more open than it now is.

74. My proposal is that it should be made clear that any and all communications between experts and instructing lawyers should be on an open basis with a practice of such communications being copied to the other side or sides.

75. Without such a practice, it is unlikely that any irregularities will come to light: for example in <u>*Pickle v Balkind*</u> it was only because of accidental disclosure of correspondence revealed what had happened.

The International Perspective

76. My last point: it seems to me that it is important that we who are concerned with UK domestic litigation need to get our house in order.

77. TECBAR members are now very widely instructed as counsel or arbitrators in international arbitrations. Often in those arbitrations, directions make provision for without prejudice discussions between experts, importing a very useful UK procedure into those arbitrations.

78. Given the differing professional duties of advocates in different jurisdictions, not least between US attorneys and UK lawyers, and between common lawyers and civil lawyers as to what discussions between lawyers and witnesses are appropriate, the problems which have been experienced in the UK Courts are likely to be magnified when our procedures are adopted in a very different context.

Two last matters

79. Two last matters:

(1) It seems that we may also need to revisit the interplay between lawyers and experts in respect of experts' reports.
(2) I have been enormously helped in the preparation of this talk by a very able pupil in my chambers, Sophie Ashcroft, to whom I am enormously grateful. It will however be obvious that the errors in this talk are all mine.