Internship Report

The role of expert witness evidence in civil proceedings

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I would like to express my sincere gratitude to **Mr Peter Webster** for giving me the opportunity to work at **Thea Limited Solicitors.** Mr Webster greatly welcomed me in this firm and gave me the considerable chance to undertake a very practical experience. Mr Webster was very kind to show me the ins and outs of being a UK lawyer by taking me, for example, to a bankruptcy hearing located in a Crown Court and at the barrister's chambers. All of this was a very rare experience for which I am more than thankful for.

Working with **Mr Webster** has also been very fruitful on the academic level. Mr Webster provided me with a full access to his upcoming cases. I could therefore not only develop an understanding of the application of theory in practice but also gain substantial legal knowledge in a wide variety of field, such as Bankruptcy/ Insolvency Law, Tort Law, Civil Procedural Law.

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List of abbreviations

- CPR: Civil procedural rules
- ECHR: European court of human rights
- Thea Limited: Thea Limited solicitors, firm where I undertook work experience
- Practice Direction:Practice Direction part 35
- UK=United Kingdom
- ECJ: European Court of Justice
- Expert: experts in civil litigations providing expert witness evidence

Introduction

Numerous reasons motivated me to undertake work experience at Thea Limited Solicitors in London. Firstly, I believe that my personal background has been marked by internationality as I have grown-up, lived and studied in different countries. Therefore, I was drawn towards taking a more international approach to my studies. I believe this would not only give me a better outlook into the practice of law but also enrich my studies. It was for this reason that having undertaken work experience at the European Court of Justice of the European Union as well as going on a year abroad at Leiden University were particularly rewarding opportunities. In this context, I believed gaining work experience in London was a natural step towards my academicals and professional expectations. Furthermore, I am willing to prepare for the New York Bar Exam to complete my curriculum and hope to be admitted to an LLM in London to fulfil the bar requirements. This experience was particularly valuable to confirm my decision to apply to these programs as well as giving me a greater insight on how the law is practised in Common Law countries. Secondly, during my bachelor, I found a great interest in comparative law related subjects, therefore orientating my module choice in this perspective. Hence, I undertook introductory courses of English law during my second year of bachelor and found this fascinating. Furthermore, while studying business law at Aix-en-Provence law school I realised that some aspects of English contract's law are particularly relevant to this field. Throughout my studies, I was confronted with how contract law adapts to specific areas and needs of businesses which is a reason I was and still am highly interested in learning more about the more niche area of construction law, practised by Thea Limited.
For all these reasons above I believe my experience at Thea Limited was of a great value for my personal understanding of English law and at the same time particularity enlightening in the perspective of my curriculum and current studies.

I am very grateful for having had the opportunity to work at Thea Limited Solicitors. This law firm developed an expertise in the areas of engineering law, construction contract law, civil litigation and alternative dispute resolutions. Thanks to its very specialised practice areas, Thea Limited provides excellent legal advice to clients experiencing difficulties in construction

matters. However, provided by its wide range of clients and its experienced solicitor, Thea Limited extends its practice to “non-construction law” related civil litigations.

In this firm, my tutor gave me considerable opportunities to closely follow up on upcoming cases. My first task was to help to prepare a bundle prior to the hearing of a bankruptcy case involving a personal debt. After this hearing, my tutor asked me to sum up my understanding of the case and at the same time write down what I thought would be necessary further steps to take. While accomplishing this work I realised that the expert witness’s opinion delivered in this case was fundamental and determining evidence. Subsequently, as Thea Limited had to deal with a construction law cases I had the chance to read through its corresponding material. The dispute revolved around unsatisfactory work carried out by a construction company who decided to start legal proceedings against Thea Limited’s client. This case involved expert evidence as to assess the quality of the work accomplished by the construction company. After preparing multiple copies of the bundle for the insolvency case and at the same time going through very detailed expert witness evidence, it became clearer to me that the expert plays a significant role in civil proceedings in practice. However, it appeared that many practical issues arise from the expert witness evidence, in particular, ones of strategic importance for the correct guidance of civil proceedings. These practical issues I encountered will be summed on and, for this reason, I dedicated this internship report to the study of the *role of the expert witness evidence in civil proceedings* based on both research and my personal experience at Thea Limited. The role of the expert can determine the outcome of many cases while still remaining a controversial question, which will be answered accordingly with the following outline:

1. The current law ruling the expert witness evidence

One might think that constructions generally end on time and within budget, but the reality is not even close to this assumption. The complexity of some constructions, due for example to the involvement of numerous subcontractors/companies on the construction sites, can very quickly lead to a number of problems. This means that civil proceedings may quickly follow. This slippery slope is particularly undesirable as evidence is generally difficult to bring to court. For this reason, construction parties have made a very wide use of expert witness evidence to support their complicated case, sometimes to such extent that some litigations only revolve around the expert witness evidence. Such use of the expert witness evidence is understandable where it is indeed difficult to imagine a pleading lawyer having to explain to a judge for what technical reasons a whole building collapsed. Not only would it be a loss of time but that would be expecting every lawyer to be an engineer. Therefore, now that the importance of experts in construction law proceedings is established, this report will outline what exactly an expert opinion is and ultimately what are the circumstances that could lead to its use.

1.1 What is an expert witness evidence?

This question might sound too simplistic to gain any substantial relevance. However, it appears that defining an expert opinion is not an easy process. Hence, knowing how to deal with an expert could be case solving, especially when the question resolves around whether an expert is actually a "legally" recognised expert and therefore valid to the case proceedings. For this matter, the *Part 35 of the Practice Directions of the Civil procedure rules* provides guidance to practitioners wishing to make use of expert witness evidence and proposes a very brief definition of experts. This reads: **"***A reference to an "expert" in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings"*[1]

A more general definition of the expert can however be as follow: *"an expert witness is a witness who provides to the court a statement of opinion on any admissible matter calling for*

[1] Civil procedural rules, rule 35.2(1)

expertise by the witness and is qualified to give such an opinion"[2]. Whilst analysing the *Practice Direction 35* one could notice that the expert's role varies depending on the way he is summoned to court. For this reason, providing one plain definition of the expert witness evidence is a methodological dead end. A functional approach to defining the term expert witness is therefore necessary. As such, the expert can be appointed by one of the party or by the tribunal.

When the expert is appointed by one of the parties, he embodies the role of a witness[3]. The role of this expert will be to assist the judge in finding the truth by providing relevant information to the case laid down in a report submitted to the Court. However, the expert witness is not to be confused with a factual witness whose role is to relate facts he has the knowledge of and upon which a decision can be made. In contrast, the expert witness is a professional, specialized in a specific educational field concerning the case. For example, an individual could have witnessed a pipe falling off a building which as a result created damages on a construction site. In such case, if litigations arise, the witness can be summoned to court to explain facts he witnessed. In parallel, each party to the litigation can contact a professional engineer who can determine if the damages on the construction sites were due to the falling pipe. In any case, the appointment of a single joint witness must be authorized by the judge according to specific procedural rules that shall be discussed further on.

Nonetheless, the courts can also find a significant interest in appointing their own experts. In this case, the "single joint expert"[4] role does not differ greatly from the party-appointed expert as he will have to look out for relevant information. However, the joint expert will have to receive the complaints of each parties and reproduce them in a single report submitted to the court. This is different to the party-appointed expert who creates a report for each party. The tribunal's power to appoint its own expert is not however found in Civil Procedural Rules, but rather in the specific area of law, such as Construction l[5] In any case, the

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[2] Crown Prosecution Service. Expert Evidence. 2014

[3] Pickavance, Keith. "The Expert's Perspective". Construction Law Journal (2013)
[4] Practice direction part 35 Para 7; CPR 35.7
[5] Arbitration statutes and rules frequently allow the appointment of expert witnesses by the tribunal: see s.37 of the Arbitration Act 1996, Art.22 of the AAA International Arbitration Rules (2010), Art.21 of the LCIA Rules (2013)

Civil procedural rules encourage the use of a single joint expert for small claims without, however, stopping the parties from appointing their own expert advisors[6]

While the role of the Expert Witness depends on the way he is summoned to court, this distinction finds its limit when comparing the Expert Witness to the Expert Advisor. The use of an expert advisor/witness depends on the nature of the instruction[7]. If the expertise is sought by one party to advise it specifically and confidentially upon tactics in the litigations, then an Expert Advisor might be required. In contrast, if specific and technical evidence have to be submitted to the court, the use of an Expert Witness would be more recommended.

Lastly, in civil proceedings, the notion of "expert" could not be understood without the term "evidence"[8]. The expert witness evidence differentiates itself from the evidence provided by a factual witness by one main reason: the expert witness evidence is opinion based. For example, during my work experience at Thea Limited, the defendant in a case, for I had the opportunity to work on, was an owner of premises containing multiple apartments. He contracted with a company to conduct repairing work on the roof to strengthen its sealing. However, it appeared that the work was unsatisfactory and the sealing of the roof only partially accomplished. For this matter, Thea Limited was representing the defendant and decided to appoint an expert witness to assess the quality of the work. In parallel, the claimant appointed their own expert to provide contrary evidence. Here, the expert witness evidence chosen by Thea Limited was not giving evidence to the court but an opinion as to whether the work carried out reached the minimum standard excepted by the defendant. Therefore, in opposition to a factual witness, who provides the court with evidence based on what are the facts he witnessed.

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[6] In this case, the costs incurred by the appointment of an expert advisor are not recoverable
[7] Institue and Faculty of Actuaries. Providing Expert Opinion In Legal Proceedings: A Guide For Actuaries. Regulation board, January 2015.
[8] Guildhall Chambers. Expert Evidence: Back To Basics And Recent Hot Topics. 2011.

1.2 The circumstances leading to the use of an expert witness evidence in construction law proceedings

Whereas expert opinions can be a desirable factor is some civil litigations, there are however cases that require the presence of an expert evidence and cases that do not. The answer to this distinction lies within the expert duties but also, to a certain extent, within the nature of the facts.

For some area of laws, such as Construction law, the high level of technicity attached to the facts can quickly lead the parties to appoint their own expert. For this reason, the legislator created a Scheme for Construction Contracts[9] implementing an adjudication procedure. Among many powers granted to the adjudicator he can also appoint an expert acting as a single joint expert. A construction contract must comply with specific requirements[10] and if it fails to do so, the adjudication procedure will be enforced to the litigation provided that the parties cannot reach an agreement and that the contract does not comply with *section 110 of the Act*. In this hypothesis, the adjudicator can either require the use of an expert opinion and this procedure can therefore lead to a mandatory appointment of a single joint expert or he can provide evidence himself. However, in practice, the adjudication procedure is to be avoided for numerous reasons. Firstly, because of the increased costs[11]. Secondly, construction litigations may indeed concern complicated matters but can also have very simple outcomes, such as the non-payment of subcontractor; In such case the involvement of adjudicator would only add unnecessary extra costs to the procedure. Furthermore, while it is possible to contest the adjudicator decision further along in the proceedings, the cost incurred during the adjudicator procedure might not be recoverable. Therefore, the especially economically weaker party in proceedings could be greatly deterred because of this. They may indeed be less inclined to continue proceedings further.

In contrast, if the *Scheme for Construction Contracts* was not to be applied during the procedure, many other reasons might lead the parties to appoint an expert. In construction

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[9] The Scheme for Construction Contracts (England and Wales) Regulations 1998
[10] section 108(1) to (4) of The Scheme For Construction Contracts (England and Wales) Regulations 1998
[11] McLean, Gerald. "Expert Evidence In Adjudication". Construction Law Journal (2016): Const. L.J. 498.

litigations, the dispute can revolve around very complicated facts and therefore require expert evidence to provide clarity to the court. For example, in a recent case decided in April 2017, *Cunningham (t/a Urban Developments) v Buckley*[12], the owners asked a builder to conduct certain works on their property. The owners paid only a part of the sum charged by the builder and when the builder brought civil proceedings, he counterclaimed for defective work. In this case, the judges found that the evidence of a second builder carrying out rectification work was not sufficient and admitted instead evidence as to costs from the single joint expert previously appointed. Here, due to the complexity of assessing the costs of the work, the judges were not satisfied with the evidence brought by a second builder. We can therefore observe the importance of expert evidence in construction litigations and the underlying expectations of the court in such matter.

Similarly, during my internship at Thea Limited, the complexity of the dispute between a landlord and a company carrying out roofing work brought both parties to appoint an expert. The question as to determine if the work carried out ensured the sealing of the roof suggested the use of precise evidence. In this context, I had the opportunity not only to examine the content of an expert report but to assess the importance of the party appointed expert to resolve the conflict.

1.3 The admissibility of the expert witness evidence

The starting point of a procedure involving expert witness evidence remains in the judge's hands when permitting to rely on expert evidence. On a practical level, the permission may be given in court's own management directions or in response to an application made by one of the party[13]. When applying this, the parties must identify the field in which expert evidence is required and if possible, the name of the proposed expert, bearing in mind that the name proposed will be the only one valid during the whole procedure. However, different rules apply when the Court appoints a single joint expert[14]. This power granted to the courts may be exercised at any time during the procedure but varies depending on the form of the procedure. For example, where a case is allocated to the small claims track, the procedural rule is that no expert may give evidence without the permission of the Court. Here, the possibility of bringing

[12] [2017] EWCA Civ 224
[13] CPR rule 35.4(2) and (3)
[14] CPR rule 35.7

expert evidence is particularly restricted. Where the case is allocated to the fast track, the principle remains that expert witness evidence, if permitted by the court, should be restricted to particular issues. Therefore, it appears that in every case, a general trend towards restricting the admissibility of expert witness evidence can be observed.

In his *Access to Justice* report[15] Lord Woolf recommended restricting the admissibility of expert witness evidence. His views are now enshrined in *the Practice Directions Part 35* that takes a very restrictive approach to the expert witness evidence. This restrictive conception was only introduced with the Access to Justice report, however a long tradition of judges having a very suspicious attitude toward expert witness evidence can be observed across all Common-Law countries. For example, in the Australian case *Queen v Bonython*[16], the judges expressed strict expectations to allow the use of expert witness evidence: "*before admitting the opinion of a witness into evidence, the Judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject matter to render his opinion of value in resolving the issues before the Court"*. The United States of America have also considerably restricted the admissibility of expert witness evidence in civil cases. A study conducted by the Law review *"Law and Policy"* of the University of Denver[17] shows, with empirical figures, that Judges are more likely to admit expert witness evidence when issued by the government in a criminal case than by a plaintiff in a civil case. On average, 95% of expert witness evidence submitted to the Court are admitted in Criminal Cases where only 51% of Civil Cases. More specifically, in a Civil case, 39% of expert witness evidence is admitted when issued by a Plaintiff where 91% are admitted when issued by a Defendant. Such views confirm the mistrust surrounding the admissibility of expert witness evidence in civil litigations.

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[15] Lord Woolf, "Access to Justice": Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (June 1995) and Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996)

[16] [1984] 38 SASR 45 at 46.

[17] Dioso-Villa, Rachel. "Is The Expert Admissibility Game Fixed?: Judicial Gatekeeping Of Fire And Arson Evidence". Law & Policy 38.1 (2015): 54-80.

2. The main legal evolution of the expert witness evidence

This history of expert witness evidence in England started in 1784[18], when John Smeaton, a British civil engineer, was appointed before an English court over a construction issue in Norfolk. Nowadays experts have developed a very wide practice by offering expertise in both civil and criminal cases. Nonetheless, procedural rules concerning expert witness evidence have been rationalised through various reforms and despite the multiplication of companies/ individuals offering expertise, the current legal climate does seem to encourage such profusion.

A general trend of suspicion towards expert witness evidence can now be observed. Before modern reforms were instituted, the courts doubted the value of expert witness evidence and this played a significant role in defining the boundaries of the expert's prerogatives. For example, in the case *Davie v Magistrates of Edinburgh*[19] Lord President Cooper reaffirmed the discretion of the judges over expert witness evidence by stating, in particular, "*their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence*" Here, Lord President Cooper was insisting on the very subsidiary nature of expert witness evidence and consider it being a support to the judge's decision but not, in any case, an irrefutable argument. This landmark case drew the line[20] on the expert's duties and by doing so limited the importance of the evidence that he provides. The expert therefore owns a duty of assistance to the court and not to his client.

More recently, the principal duties and responsibilities of the expert have been summarized by Mr Justice Cresswell in the far-reaching case *National Justice Compania SA v Prudential Assurance Company Limited*[21]. In this case, Mr Justice Cresswell believed that uncertainties with regards to the duties of the expert witness leads to lengthened procedures. For this reason, he listed the duties and responsibilities of the expert witness already established in the previous jurisprudence, which also received approval in Scotland[22]. For example, in previous cases, the

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[18] Huyghe Sr, Steve, and Adrian Chan. "The Evolution Of Expert Witness Law Under UK And US Jurisdictions". Construction Law International 8 (2013): 14-18.
[19] 1953 S.C. 34
[20] Suntherland, Robert. "The Role, Duties And Responsibilities Of The Expert Witness In Litigations". Expert Witness Training Seminar. 2009.
[21] [1993] 2 Lloyds Rep 68. (Also Known as the Irakian Reefer case)
[22] Elf Caledonian Limited v London Bridge Engineering Limited (1997)

judges found that expert witness evidence should be independent when submitted to the court[23] and also required for the expert witness to provide objective unbiased opinion in relation to matters within his expertise[24] This authority is still a landmark case in respect of the duties and role of the expert witness evidence. Furthermore, the introduction of the *Civil Procedure Rule in 1999* enshrined the expert duties initially detailed in the *Ikarian Reefer case*[25].

The *Woolf Report of 1995* (also known as the *Access to Justice Report)* has been a turning point for the expert witness evidence admissibility. The Woolf Team dedicated themselves to improving the access to justice, reduce the cost of litigations and ultimately removing unnecessary complexity[26]. Basing themselves on the German model, the Woolf team thought about regulating and controlling the procedures by allocating the cases to small/fast tracks depending on the amount of money claimed. In the end, these procedures would incur fixed costs. Such objectives had strong impacts on the expert witness evidence practice and naturally restricted the admissibility of expert witness evidence. The outcome of the *Access to the Justice Report* has been criticized by many academics[27] and practitioners that believed the report showed a lack of flexibility and was ultimately too far away from the reality of the practice. The very ambitious *Woolf Report* shows the difficulty for regulatory policies in civil procedural rules to avoid having negative impacts in practice. In any case, one question still remains: was is all worth it?

Moving away from the "cost effective" approach of the expert witness evidence experienced in the *Woolf Report,* the case *Jones v Kaney*[28] also had, nevertheless, significant consequences on the practice. Here the *ratio decidendi* was very clear and quite alarming for expert witnesses[29]: their immunity was condemned or in other words strike down. In this case, the claimant was seeking to persuade the court that the expert witness does not enjoy immunity when preparing a joint witness statement. This case was dealing with the issue of knowing

[23] Whitehouse v. Jordan, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce
[24] Polivitte Ltd. v. Commercial Union Assurance Co. Plc., [1987]
[25] For example the CPR 35.3 explains the overriding duty of the expert to the Court
[26] Zuckerman, A. A. S. "Lord Woolf's Access To Justice: Plus Ça Change...". Modern Law Review 773 (1996): 1-22.
[27] Hardy, Clive. "Rethinking Roles In Expert Evidence After Woolf". Arbitration (1999): Arbitration 86.
[28] [2011] UKSC 13
[29] Gordon, Greg. "Immunity Wearing Off: Jones V Kaney In The Supreme Court". Edinburgh Law Review (2012): Edin. L.R. 238.

whether the personal negligence committed by an expert have any remedies. However, the Supreme Court took broader views on the question and decided to strike down the immunity of the party appointed expert. Lord Dyson founded his decision on the principles that "*every wrong should have a remedy and that any exception to this rule must be justified as being necessary in the public interest"*[30] The underlying idea of this case, which is to put an end to the expert witness supremacy in civil proceedings, was also found before *Jones v Kaney* in the case *Phillips v Symes*[31]. The court held that a party appointed expert can be sanctioned to pay costs wasted by negligent advice he gave[32]. Furthermore, the immunity of the expert witness was at that time already being discussed when the judges held that it should not prevent the court to submit a wasted costs order against an expert witness.

The *Jackson Reforms of 2013,* based on the *Review of Civil litigation costs by Lord Justice Jackson 2009* and in line with the *Access to Justice Report,* sought to increase access to the courts by reducing time and costs of litigation. For that matter, the *Jackson Reforms* added requirements to the practice of expert witness evidence by requiring for example a clear statement of the work to be performed. Now, with this requirement confusion as to the role of the expert during the procedure can be avoided more easily because the parties will have to determine issues requiring experts, dates and deadlines early on. Same can be said about the costs, which will have now to be estimated. The courts have applied rigorously the *Jackson Reform,* as the case *Paul Chambers v Buckinghamshire Healthcare NHS Trust*[33] indicated when refused to extend the deadline for the defendant's expert report and preventing expert to testify at trial. More specifically, the *Jackson Reforms* amended the *CPR PD 35 paragraph 11.1-11.4* so that: "*at any stage in the proceedings the court may direct some or all of the experts from like disciplines to give evidence concurrently*" The introduction of the concurrent evidence or "Method of the Hot Tubbing" was inspired by the Australian legal system[34]. This method was assessed by a *Report of the Civil Justice council of the 25th of July 2016* which concluded that in 72.5% of the cases the Hot-Tubbing method achieved saving hearing time, 45.1% of the cases it saved costs and in 70.6% cases, it assisted the courts.

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[30] Para 113
[31] [2008] UKHL
[32] BURROWS, Andrew. English Private Law. 1st ed. Oxford University Press, 2013.
[33] [2013] EWHC (QB)
[34] Civil Justice Council. Concurrent Expert Evidence And "Hot-Tubbing" In English Litigations Since The "Jackson Reforms". 2016.

3. Practical issues

During my work experience at Thea Limited I worked on cases including practical issues arising from the use of expert witness evidence. Here, I understood that the *Practice Direction part 35* can be used strategically to help solve these issues. The main practical issues I was confronted with, using both personal experience from my work experience and academicals findings will be analysed.

3.1 The assessment of the independence of experts in civil proceedings

As previously discussed[35], the recent developments in procedural rules on the experts showed that the admissibility of expert witness evidence is now very restricted. The *Woolf Report* had already identified several key issues regarding the expert's independence which ultimately leads to the introduction of the *CPR*. For that matter, the *CPR* have enshrined the examination of the expert independence and laid down their duty of independence in *the Practice Direction part 35 Section 2.1: "Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation"* In this section, the legislator admitted that experts might go through external pressures during litigations that could influence the results of their work. For example, during my internship at Thea Limited, the expert produced a very short report that wasn't giving out sufficient details to help the case as much as it could have. Therefore, the solicitor I was working with decided to ask questions to the expert under *Section 6.1 of the Practice Direction part 35* in order to produce stronger evidence against the opponents. Here, the expert had to deal with external pressure by the clients eager to submit detailed evidence to win his case.

While the introduction of the *CPR* summarised the main issues relating to the expert's independence, the recent case law development shows that the question of the expert's independence in civil litigations it not yet fully answered[36]. As such, a number of decisions have brought attention to the independence requirement of an expert witness. For instance, in

[35] See part 2 on the evolution and part 1.3 on the admissibility of expert witness evidence
[36] Pugh Charles, and Marcus Pilgerstorfer. "Expert Evidence: The Requirement Of Independence". Journal of Personal Injury Law (2008): J.P.I. Law 224.

Anglo Group Plc v Winther Brown[37] Judge Toulmin made a general statement on the role of the expert and the influence of his lack of independence on the different actors of the procedure. He considered that a failure for the expert to take an independent approach could result in a missed opportunity for the parties to solve their dispute before trial. Furthermore, it could inflate the costs of the litigation. This case confirmed the very extensive approach taken by the judges when dealing with the independence requirement.

There are multiple hypotheses giving birth to suspicions towards the experts' independence. However, when the expert is dealing with a conflict of interest, his independence is more likely to be questioned. The judges have particularly enquired whether the expert witness evidence should be admitted when it is provided as of assistance to the Court[38]. It was concluded that evidence who sought to determine what is the applicable law does not fulfil the independence requirement as it is overlapping with the prerogatives of the Court. Furthermore, a conflict of interest can also be qualified when the party and the expert keep a very close relationship which therefore leads to the inadmissibility of the expert witness evidence. In that case, the courts[39] considered that an expert and a client being friends for 28 years lead to disregarding the evidence provided by the expert. Such appreciation raises questions as to what extent can a conflict of interest be qualified. In practice, it is very likely that solicitors will use the same expert for different litigations. During my internship, the firm I was working with was using the same expert for bankruptcy cases. I therefore realised that the clients of the firm naturally kept a close relationship with the expert. It is here to question whether a conflict of interest should be qualified or if the relationship between clients and experts are *per se* a conflict of interest.

The assessment of the independence of the expert is now regulated by the cross examination laid down at *Section 5 of the Practice Direction.* The courts can examine the content of the expert's instruction if they assume there are reasonable grounds to assume the inaccuracy of the report the expert provided.

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[37] [2000] EWHC Technology 127.

[38] Liverpool Roman Catholic Archdiocesan Trust v David Goldberg Q.C. (2002)

[39] Ibid 38

3.2 The disclosure of expert witness evidence

During civil litigations involving expert witness evidence, numerous information is exchanged between the solicitor, the expert and the client. For that matter, the legislator has required the parties to disclose evidence in order to enforce a fair procedure on all the parties. This requirement is now enshrined in the *Practice Direction part 35* at different stages. Firstly, *section 4* encourages the parties to disclose any relevant evidence in a way that the opposing party would be able to understand the significance of the information disclosed. Here, the *Practice Direction* prevents the parties from disclosing information in bad faith. In that case, the parties could try to disclose incomprehensible evidence that would bring confusion to the other party rather than providing relevant evidence helping the fairness of the procedure. Secondly, at a later stage, the parties can choose whether they want to disclose the expert's report and if yes, when. This decision is, in the end, of a strategic importance for the correct guidance of litigations.

The disclosure of expert witness evidence is a very far-reaching issue as it may concern the overall fairness of the procedure[40]. In this perspective, the *ECHR* was called upon to make a judgement on the disclosure of expert witness evidence and its compatibility with article 6 of the *European Convention on Human Rights* in *L (A Child) v United Kingdom*[41]. In this case, care proceedings were intended when M was suspected having deliberately allowed her child ("L") to swallow methadone. She further obtained an expert report explaining that L did not swallow the methadone but was, however, disproving the explanation she provided. The police made a request for the report to be disclosed and it was granted. M complained that her right to a fair trial under *article 6 of the European Convention on Human Rights* was breached. On the contrary, the *ECHR* held that her right to a fair trial was not violated in the instant case as all the parties were equally affected by the disclosure rule. Furthermore, the court held that M was not directly interviewed by the expert and so her right to against self-incrimination was not breached. The *EHCR* therefore made a very strict application of the expert evidence disclosure principle and at the same time reaffirmed its strength. The *ECHR* interpretation is now homogenously followed by English Courts[42].

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[41] [2000] 2 F.L.R. 322

[42] BURROWS, Andrew. English Private Law. 1st ed. Oxford University Press, 2013.

Even though the principle of the disclosure of expert witness evidence is strictly interpreted by the Courts, many issues can still arise from its application[43]. For example, in the case *Beck vs Ministry of Defence*[44] the Court of Appeal was asked to deal with the question of whether a defendant can change expert without disclosing the report of the expert first instructed. The Court held that if a party seeks to instruct a new expert witness and discard the evidence provided by the expert instructed in the first time, his opponent is entitled to claim disclosure of the original evidence, however provided that an application to instruct a new expert has been granted. The reach of this case has been consequently criticised on both theoretical and practical aspects.

In practice, this case can be very relevant to practitioners who, discontented from the report provided by their expert, want to benefit from a new look on the case by a newly appointed expert. In such case, practitioners must therefore be aware that the first expert report will be automatically disclosed. This can potentially be held against them in court or put them in a disadvantageous position. During my internship for instance, Thea Limited was confronted to a very "weak" expert witness report, meaning it was not sufficiently helping the case[45]. Here, where Thea Limited could have instructed another expert, it still decided to ask additional questions to the expert under *section 6 of the Practice Direction* in order to obtain more detailed evidence. On the contrary, if Thea Limited decided to instruct a new expert, it would have been risking the other party to access the original report and use it as counter evidence.

In theory, *Beck vs Ministry of Defence* has been approved by *Vasiliou v Hajigeourgiou*[46] that confirmed at the same time its importance. Indeed, *Beck vs Ministry of Defence* put an end to the practice of "*expert shopping"* by inflicting a very strong limit to the change of expert: the loss of confidentiality. Consequently, the courts have followed this approach[47] and the disclosure of expert witness evidence is now closely regulated. Furthermore, while staying in line with *Beck vs Ministry of Defence* the case *Allen Tod Architecture Ltd v Capital Property*

[43] McCarthy, Frances. "Case Comment". Journal of Personal Injury Law (2003): J.P.I. Law C162. Print.
[44] [2003] EWCA Civ 1043
[45] Thea Limited was using a party appointed expert to provide evidence against its opponents in a construction case
[46] [2005] EWCA Civ 236
[47] EdwardsTubb v JD Wetherspoon [2011] EWCA Civ 136

and Infrastructure Ltd[48] still added precisions to the issue of expert witness evidence disclosure. In this case, the court considered "*whether permission for the claimant to rely upon the expert report of a new expert was to be conditional upon the claimant disclosing, among other things, any document or correspondence containing the substance of the expert opinion of the original expert"*[49] The judges ordered the disclosure of the litigious documents and by doing so, considered they had the power to order disclosure of any documents containing the expert's opinion. The Court concluded that this power should be used in a reasonable case to case basis and having regards to precise circumstances without, however, giving more information as to how these powers are limited. The judges therefore indirectly created an opportunity for further litigations to arise on this particular point. Furthermore, this decision, among others previously quoted, shows that Courts apply the *Practice Direction part 35* rigorously and wish to extend the principle of expert witness evidence disclosure to a generous extent.

[48] [2016] EWHC 2171 (TCC)
[49] Practical Law Dispute Resolution. Court Orders Disclosure Of Documents Containing Expert's Opinion (TCC). Thomson Reuters, 2016.

4. Benefits and negatives of the expert witness evidence in civil litigations

We have seen that many practical issues arise while using expert witness evidence in civil litigations. However, on a larger scale, the conformity of expert witness evidence with general principles of civil procedure and its assistance in reaching a better administration of justice can still be discussed. Therefore, we shall examine both benefits and negatives of using expert witness evidence for the purpose of satisfying the fair trial requirements and, more extensively, reaching the truth during civil trials.

4.1 Does the expert witness evidence helps satisfying fair trial requirements?

The right to a fair trial is a cornerstone of civil procedural rules, its application can be used as a defence mechanism in a wide variety of litigations[50] and it became, as a consequence, a very contentious principle. A study conducted by the *ECHR*[51] shows that in the UK, among many other countries, a significant number of applications have been made under *article 6 of the ECHR*[52] (1,977). In this context, where the expert is an active actor of the procedure, it is to question whether his presence can help satisfying or, on the contrary, block fair trial requirements. More specifically, the principle of equality of arms has been called by the court a fundamental principle of the right to a fair trial laid down in *article 6 of the ECHR*[53]. Equality of arms involves providing each party of the procedure the reasonable opportunity to present its arguments, without however putting the opposing party at a disadvantage. With regards to this principle, this report will discuss both hypotheses under which the expert contributes positively and negatively in reaching a fair trial.

On one hand, the *CPR* do not intend to stop the specific situation in which one of the party appointed his expert and the other one did not. As previously discussed, expert witness evidence does incur consequent costs for the parties[54] which can be seen as a deterrent to

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[50] For example, in European Competition law litigations, undertakings, when observing the general increase of fines pronounced by the Commission have been invoking the right to a fair trial as a defense
[51] DOC26
[52] Implemented in the Human Rights Act (1998)
[53] European Court of Human Rights, Delcourt versus Belgium, 17th of January 1970, par. 21
[54] It was concluded in part 1.3 that expert witness evidence is a very cost related issue

employ an expert. In this hypothesis, assuming that expert witness evidence is provided by only one of the parties[55] and that it does increase the chances to convince the court, the party deprived of expert witness evidence would be set in an unfair position. Hence, this would be a breach of the principle of equality of arms. Here, two assumptions have been formulated to deduct the breach of the principle equality of arms.

Firstly, it is assumed that using expert witness evidence influences the court's decision and therefore provides the party with a strategic advantage. This assumption can be considered by both practical and theoretical elements. In practice, during my work experience at Thea Limited, the firm appointed an expert to prove and quantify a debt in a personal insolvency case. At the hearing, Thea Limited insisted that the appointed expert presents himself before the court without, however, the procedure requiring his presence. In this situation, I could witness to what extent an expert witness can indirectly influence the judge's decision and be used as a persuasion tool. I also noticed that the opposing party did not benefit from the presence of an expert and was therefore set in a less conformable position. In substance, a study conducted by the Journal of the American Academy of Psychiatry and the Law[56] observed that expert witness credibility and, consequently, its capacity to influence the court's decision making, is not connected to his degree of confidence. It therefore concluded that expert witness evidence has a positive influence on the judges regardless of its credibility.

Secondly, we have seen that using expert witness evidence is a very expensive and risky operation if the costs are not recovered further in the procedure. The costs of bringing expert witness evidence can therefore deter weaker parties from bringing more detailed evidence. On the contrary, wealthier parties could have the opportunity to bring expert witness evidence and to convince the court more easily.

On the other hand, expert witness evidence can greatly contribute in reaching the principle of equality of arms and consequently the fair trial requirements. The recent reforms[57] have considered the cost related issue in litigations involving expert witness evidence and have

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[55] For example because one of the party does not want to incur expert related costs
[56] Cramer, Robert J., Stanley L. Brodsky, and Jamie DeCoster. "Expert Witness Confidence And Juror Personality: Their Impact On Credibility And Persuasion In The Courtroom". Journal of the American Academy of Psychiatry and the Law 37 (2009): 63-72.
[57] Point 1.3 of this report

as a result set different tracks for civil procedure. This reform has proven to reduce costs in civil procedure and made experts more “affordable”. Furthermore, the method of the “hot tubbing” gives parties equal chances to successfully conduct their cases as the judges will hear both expert and deduct a general trend to take his decision.

4.2 Is expert witness opinion necessary serving the truth?

When assessing the benefits and negatives of expert witness evidence, one can wonder whether expert witness evidence helps the judges to reach the truth. It can be assumed judges read through evidence the version of the fact they consider being the truth. However, depending on the evidence provided to them or, more specifically, to both parties version of the facts, the judges might take a decision contrary to their belief of the truth, bearing in mind the truth lies beyond the boundaries of their prerogatives[58]. In any case, the nature of the evidence and their understanding by the judges play a dominant role in the judge's perception of the truth.

When the judges are able to understand the evidence, they will try to reach the truth based on the version of the fact they think is most believable. For example, if a party argues that he wasn’t present on a construction site while the opposing party submit evidence that he was, the judge will look into the evidence to conclude what is the truth. Here, the judge is therefore able to understand the content of the evidence to give his decision. On the contrary, if the parties are not able to provide evidence because of the technicality of the litigation, without using expert witness evidence, the truth won’t be properly assessed because of a lack of evidence. In this context, one can assume that using expert witness evidence provides the judges with more elements to find out the truth. However, this assumption is based on a secondary one, which is that expert witness evidence is impartially provided[59].

[58] For example, if both parties agree upon saying that the building collapse for X reason, the judge will not have the authority to say that it collapsed for Y reason, based on the evidence he was provided with.
[59] We have discussed in section 3.1 that, in practice, expert witnesses can be exploited by parties which cause a natural lack of impartiality

In any case, the judge will have to rely on the expert witness to take his decision. A study[60] showed that different factors may impress the judges in the presentation of expert witness evidence and therefore influence the judge's conception of the truth. For example, the gender or the ability to express themselves clearly is a relevant factor leading the judges to positively receive expert witness evidence. In this case, it's not the content of the evidence brought by the expert that influence the judge's decisions but the expert's characteristics and ability to convince. Therefore, the judges are dispossessed from their prerogatives and must rely on experts whose interest is not necessarily to serve the truth. In such case, it can be argued that expert witness evidence is, in essence, not serving the truth.

[60] Martire, Kirsty, and Agnes Bali. "Judicial Attitudes Toward Expert Evidence". (201)

5. Conclusion

Construction litigations, as well as other technical fields, have proven to show an important dependency on expert witness evidence. The technicality attached to this field have made the expert witness an active actor of the procedure. Paradoxically, the role of the expert witness still greatly varies depending on the way he is summoned to court and on previous arrangements made by the parties. This lack of legal certainty was treated by the legislator who implemented a rationalisation to the practice of expert witness evidence. As a result, access to expert witness evidence is now restricted by formal requirements strictly interpreted by the jurisprudence. The legislator also identified key procedural issues related to expert witness evidence, such as the costs involved, and the independence of expert witnesses. In this context, the recent legal evolutions suggest a very restrictive approach to expert witness evidence admissibility, supported by the *Woof Report* and concretise further on by the *Jackson Reforms.* The case law development lead to shape a dutiful (to the court) and impartial expert witness whose role is now strictly established. Inspired by the Australian legal system, the method of the "hot tubbing" has gained popularity in England and aims at using appointed experts concurrently. This method should ultimately lead to independent evidence closer to the truth that to the parties' aspirations. It remains now the most innovative form of using expert witness evidence in litigations and the most consensually accepted.

Despite the rationalisation of expert witness evidence, practical issues yet remain. My experience at Thea Limited taught me that strategic choices can be made upon those issues. The independence of expert witnesses can sometimes be discussed and therefore appreciated depending on the way the solicitors acts towards his experts. Here, the notion of conflict of interest has been broadly interpreted by the judges who tried to prevent practitioners from keeping a "too close relationship" with appointed experts. In reality, however, I realised that the independence of the experts is naturally restricted by the human relationship kept between experts and the other actors of the procedure. In parallel, the disclosure of expert witness evidence can lead to many practical issues that can hypothetically determine the outcome of some cases. The disclosure of expert witness evidence usually comes with a loss of confidentiality on the expert report. The consequences can be quite dramatic as the expert report

will be available to be used as counter-evidence by the opposing parties. The jurisprudence has proven to be very conscious of this sanctioning character, while for example discouraging the use of a second expert by sanctioning it with the loss of confidentiality.

Experts witness evidence plays a significant role in the overall balance of the procedure and can, in some cases, put parties at a disadvantage. For this reason, numerous litigations highlighted the lack of compliance of expert witness evidence with the fair trial and more specifically, the principle of equality of arms. However, the recent legal evolutions show a deep concern coming from the judicial authority to discredit experts. This has led to the use of methods such as the hot tubbing, which can be seen as an answer to the issue of the fair trial. In general, however, the presence of experts at Court suggests questions as to their role in reaching the truth. The exploitation of expert witness evidence by the parties or the influence of expert's characteristics on the judge's decision raises questions as to expert's overreaching convincing powers. The inquisitorial role granted to the expert suggests a reduction of the judge's prerogatives and needs to be carefully watched.

The term expert now refers, in general terms, to a particularly well-educated individual in a specialised field and became part of our day to day life. Experts can be interrogated at the television to provide very detailed views on a technical topic, asked to take part in the criminal investigation or to provide evidence in court. While experts have gained the monopoly of knowledge in some technical topics, a certain credibility has been granted to them. The legal sector has shown great reluctance to grant the expert too much leverage on civil procedures. However, it appears that experts can still be exploited to successfully conduct civil litigations. In the end, many practical issues are arising from their presence in Court. On a larger scale, defying experts is, nonetheless, an important step towards reaching the truth and preserving the democratic debate. Western governments have made a wide use of experts in mass media to somehow justify policies, bearing in mind that experts opinion, by hiding the truth beneath technical terms, would be automatically approved.

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