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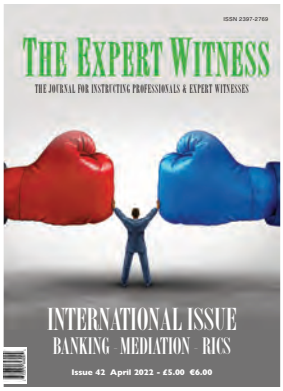

Welcome to the Expert Witness Journal

Hello and welcome to the 42nd edition of the Expert Witness Journal.

This edition has a focus on International experts and their fields of expertise.

Our international articles include; Sailing through stormy waters during overseas investigations by Martin Chapman and Torie Hamilton Wilson of Azets. High court hands down first ever merits judgment on international banking transfer rights under Lebanese law – Vatche Manoukian v Société Générale De Banque Au Liban S.A.L and Bank Audi S.A.L., by Graham Shear, partner, Andrew Street, senior associate and Irina Tuca, trainee solicitor at Bryan Cave Leighton Paisner LLP. The flagrant copying breaches in fashion by Fergus Brown, Trainee Solicitor at Stevens & Bolton and, Why isn't transferring health data across borders for research purposes easier? By Victoria Hordern.

Plus articles on recent expert witness developments.

Our next issue will be published in June 2022 and will have a personal injury focus.
If you wish to contribute please mail us.
Many thanks for your continued support.
Chris Connelly

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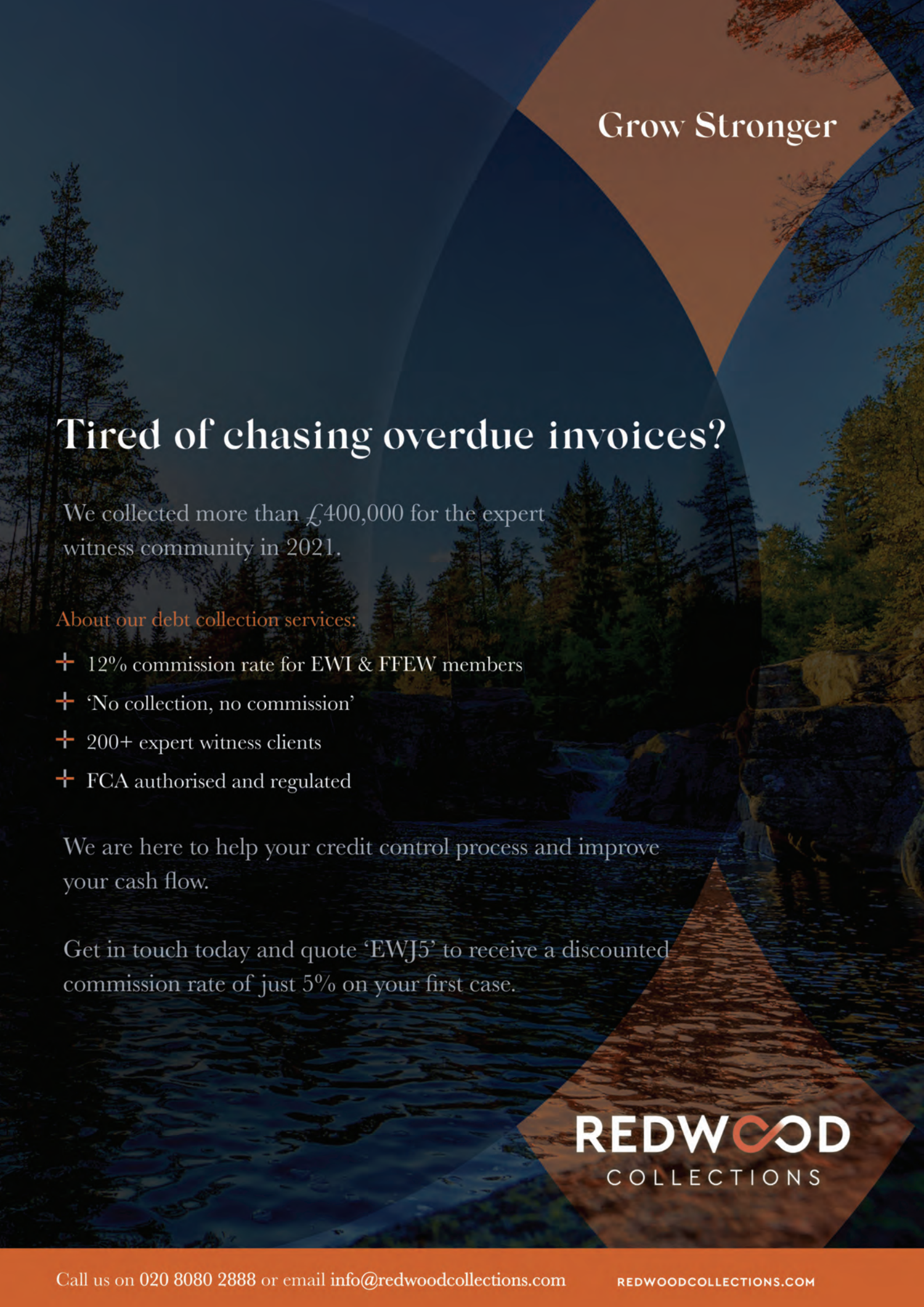
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Benefit of the Doubt? Update on Experts' Duties and Witness Credibility

In Radia v Marks [2022] EWHC 145 (QB) the High Court has clarified that an expert's scope of duty does not involve a duty to protect a party from the risks of an adverse credibility finding.

Background and facts

The Claimant worked for a global investing firm (Jeffries) between 2006 and 2017 as a research analyst in the equity market. On 19 November 2009 he was diagnosed with Acute Myeloid Leukaemia ("AML") after which he underwent four cycles of chemotherapy. He returned to work on a phased basis in June 2010.

In 2015 Claimant commenced proceedings in the Employment Tribunal alleging disability discrimination during his phased return to work (the disability in question being AML). In a Judgment handed down on 3 February 2017, the Claim was dismissed. The Tribunal found that the Claimant had not told the truth, but also that he had intentionally misled the Tribunal. The Claimant was found to have been dishonest about information concerning his weight following chemotherapy and concerning a holiday in Mexico in May 2011 which he claimed he had been forced to miss. The dismissal of the Claim was swiftly followed by an application from Jeffries for its costs.

In terms of the proceedings at hand, the Claimant commenced a civil action for damages in May 2018 against the Defendant, a consultant in haematology and stem cell transplantation at Bristol University Hospitals NHS Foundation Trust. He was instructed in the liability hearing as a single joint expert to report upon the effects of AML and the effects of the treatment upon the Claimant's condition as well as his mental and physical fatigue levels during his phased return to work. The Defendant had made a handwritten note on weight loss stating "95kg > 50kg white hair, looked 60 years. Not depressed", and this note informed the conclusions in his medical report that the Claimant had lost 50% of his body weight after treatment and therefore the Claimant was suffering from fatigue associated with the chemotherapy.

The Claimant alleged that the Defendant was in breach of duty (in tort and contract) in misreporting the account he had given the Defendant at a consultation in 2016 concerning his chemotherapy-related weight loss, and then compounded that error by not undertaking a competent review of the medical records. There was a discrepancy between the Claimant's weight as recorded by the Defendant in his report and that recorded in the medical records, and this inconsistency was explored in the liability hearing. The Claimant submitted that such breaches of duty led to the adverse liability findings and the consequential adverse costs order.

The key issues

The Claimant's four main criticisms of the Defendant were as follows:

- Failing to record accurately what he was told by the Claimant during the consultation on 22 March 2016;
- The Defendant had neither read nor properly cross-checked the medical records to confirm that the information he had been furnished with was correct. Had he done so, the discrepancy between what he had been told about the Claimant's weight and the Claimant's actual weight would have been noted;
- The Defendant breached his duty of care by giving oral evidence to the Tribunal which was at odds with the contents of his report, in that he accepted that if the weight on discharge had been different it would alter his analysis on the Claimant's fatigue levels;
- The Defendant was in breach of duty in leaving the Tribunal with the impression following the Defendant's oral evidence that the Claimant was deliberately misleading him thereby causing the Tribunal to find that the Claimant was dishonest.

The Defendant argued that the Claimant's weight was one of many relevant factors which he had to consider when advising on the effect of AML and the chemotherapy. Even if he had not given the Claimant the benefit of the doubt, and had identified the discrepancy in the records, it would still not have altered his opinion given that even a fall of 10kg in weight (from 95kg to 81.5 kg) would still have been significant. Further, Counsel for the Defendant argued that any duty of care owed by the Defendant did not extend to protecting the Claimant from the risk of a dishonesty finding. The Defendant also relied upon the fact that the medical records had been received in *"higgledy-piggledy fashion"* and were scanned sideways and therefore difficult to decipher.

What did the Court decide?

The Court considered the scope of duty question in depth, applying the recent decision of Meadows v Khan [2021] UKSC 21 and its linked case *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20.

The Court considered that the purpose of the Defendant's instruction was three-fold: (i) to opine upon the course of the Claimant's illness from the outset (ii) to explain the treatment and its side effects and to consider (iii) the effect of the cancer upon the Claimant's condition during two time periods. It was no part of the retainer by either party to advise or assist on issues concerning the credibility of the Claimant or the reliability of his evidence, nor was it part of the retainer to advise on the credibility of Jeffries' witnesses. The scope of the Defendant's duty did not extend to protection from the risk of an adverse credibility finding. Applying the familiar principles laid down in *"The Ikarian Reefer"* [1993] 2 Lloyds Rep 68, it was held that: *"To extend the scope of the expert's duty to the protection of a party form the risk of an adverse credibility finding would create a real conflict between the expert's overriding duty to the court and his or her duty to the party"* [61].

This was dispositive of the claim in tort.

The parties also relied upon expert evidence addressing the Defendant's standard of care in reporting upon the Claimant's AML. The Court considered that neither experts were competent to give expert evidence on the provision of expert evidence, and therefore their input was only of marginal assistance. Mrs Justice Lambert considered that the Defendant's failure to notice the weight discrepancy did not amount to a breach of duty. The Defendant had surveyed the notes as studiously as he could in the time constraints. The Defendant could not have been deemed to be negligent because he failed to maintain his position when questioned by the Tribunal: an expert's duty is to answer the questions in a manner consistent with the overriding objective.

The Claim also failed on causation because the Tribunal had found the Claimant to have been dishonest in other respects (beyond the issue about the Claimant's weight). As for the costs issue, the costs order did not follow from the dishonesty findings but from the finding that the claims had no reasonable prospect of success and that the Claimant was aware of those poor prospects.

Importance for practitioners

No doubt, the decision will come largely as a relief to expert witnesses. The Judgment provides a useful recap on the principles set out in Meadows and Manchester Building Society, and provides a refresher on the fundamental principles of the *Ikarian Reefer*. The case serves as a welcome warning on the limits of an expert's scope of duty: witness credibility is a matter for the Court, and experts must provide independent, and unbiased opinions at all times.

Author

Charlotte Wilk

Charlotte has a particular interest in clinical negligence, personal injury, and professional negligence. Prior to joining Gatehouse Chambers as a Third Six Pupil, Charlotte undertook pupillage at a leading professional negligence set.

Dr Zuber Bux v The General Medical Council

by Dr Thomas Walford BSc PhD C Eng MIMechE MIET MEWI MAE CDipAF

This case concerns the duties of an expert witness and, in particular, the duty to disclose any conflicts of interest.

Dr Zuber Bux provided medico-legal reports on holiday sickness claims under insurance policies. He provided them on *"an industrial scale"*. For example, between 2016-2017 he turned out some 684 reports earning nearly £125,000 at around £180 a time. He was instructed, through an agent, by a firm of solicitors in which his wife happened to be a salaried partner. Furthermore, he paid his fees for the reports into a private company in which his wife held a 45% shareholding. None of these facts were disclosed on his reports even though there were clearly conflicts of interest to declare, and the reports were almost always in favour of the claim. The reports were described as *"superficial, unanalytical, devoid of any differential diagnoses, and were invariably supportive of the claim."*

In 2018 the General Medical Council ('**GMC**') began to receive complaints and Dr. Bux's *"report factory"* came to their notice. Matters progressed and at a hearing before the Medical Practice Tribunal ('**MPT**'), where other failings were also brought to their attention, Dr. Bux was struck off the Medical Register. The MPT had *"made findings of fact that the appellant had acted in a state of conflict of interest, dishonestly and for financial gain."*

Those are my principles, and if you don't like them… well, I have others."

Groucho Marx

Dr. Bux appealed against this decision to strike him off and the case was heard in the High Court before Mr.Justice Mostyn. The Judge produced a useful review of the authorities relating to the duties of expert witnesses. Above all, an expert witness owes the court a duty of independence and objectivity. An *"expert should be independent, unbiased and objective"* as set out in the Court Procedural rules and reiterated in the cases of *Whitehouse v Jordan* [1981] and *The Ikarian Reefer* [1993]. An obligation to give an unbiased opinion includes an obligation to disclose any actual or potential conflicts of interest.

The court took pains to explain that there were two types of conflict of interest: those where an expert's opinions were actually influenced, and those where they were capable of being influenced by his personal interests. The first type of conflict involves *"considerable moral turpitude"*, the second type involves no wrongdoing but must still be declared. The Court made clear that in the second type of conflict, *"there is a high duty of candid disclosure imposed on an expert witness who has any degree of belief that he may be under a conflict of interest. He must disclose details of a potential conflict of interest at as early a stage in the proceedings as possible. He must disclose any associations or loyalties which might give rise to conflict. He must disclose any material that is suggestive of a conflict of interests, and will not be pardoned, if he fails to do so, by a later finding that there is no conflict of interest."* Failure to do so *"is likely to have very serious consequences"* for the expert and their report.

In deciding not to allow the appeal, Mr. Justice Mostyn commented that there was an "urgent" need for the GMC to reform its procedural rules. At the original Tribunal hearing, both sides had called medical expert evidence in support of their contentions concerning Dr. Bux's duties and obligations as an expert witness. The Judge considered this was not only unnecessary, but irrelevant and inadmissible. The questions to be addressed were *"essentially legal and factual not medical or technical…"* He was dismayed that there appeared to be a total absence of any procedural rules governing expert evidence. He had made this point in another case, *Towuaghantse v GMC* [2021] EWHC 681, in which he also adjudicated. In civil proceedings such evidence requires permission which will only be granted if the evidence will *"reasonably assist"* with the determination of the case. He went on to say *"If the court can decide the issue without reasonable assistance from an expert, then it should do so"*. The GMC rules do not require permission at all, allowing for an *"old-fashioned free-for-all."* This situation needs to be addressed and a more robust and structured approach needs to be adhered to in the future.

Link: Bux v The General Medical Council [2021] EWHC 762 (Admin) (31 March 2021)
www.bailii.org/ew/cases/EWHC/Admin/2021/762.html

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Delay vs Disruption: Know your claim?

by Shishir Kant, Senior Partner and Himanshu Batra, Principal Consultant at Masin

Delay and Disruption both are inherently interrelated but distinct issues. A loss of productivity i.e., disruption can lead to critical delay if the impacted activities are on a critical path. Similarly, a delay may result into disruption if the Contractor adopt acceleration measures to implement the Project which may lead to tasks being carried out at a lower productivity than the planned and at higher costs.

Delay and Disruption are often confusing to differentiate between. But there is a significant distinction between the two. Nonetheless both may result in cost and time overruns in the Project but the process of quantifying effect of delay and disruption is quite distinct. More attention is paid to claims regarding delays, still disruption claims can also be substantial.

The Society of Construction Law Delay and Disruption Protocol, 2nd Edition, February 2017 (SCL Protocol), defines Delay as:

"In referring to 'delay', the Protocol is concerned with time – work activities taking longer than planned. In large part, the focus is on delay to the completion of the works – in other words, critical delay. Hence, 'delay' is concerned with an analysis of time.."

The SCL Protocol defines Disruption as:
"In referring to 'disruption', the Protocol is concerned with disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower productivity or efficiency in the execution of particular work activities. If the Contractor is prevented from following what was its reasonable plan at the time of entering into the contract for carrying out the works or a part of them (i.e. it is disrupted), the likelihood is that its resources will accomplish a lower productivity rate than planned on the impacted work activities such that, overall, those work activities will cost more to complete and the Contractor's profitability will be lower than anticipated"

Delay as defined by the SCL is concerned with time, whereas disruption is concerned with the productivity. Delay may have a direct impact on the contractual date of completion of the Project, depending upon its criticality. The delay caused can be claimed in the form of EOT or LD based on the party responsible for delay (i.e., Employer or the Contractor). While in case of disruption, it may not affect the date of completion directly but still lead to monetary losses. Also, there may be no explicit contractual provision for claiming compensation for a disruption event.

Presenting a Claim of Delay
For instance, delays emanating from an Employer's risk event were faced on a Project. In order to claim the time and cost owing to such delay, the Contractor would need to demonstrate the following:

- That the delay has genuinely occurred on the Project and that the Employer is responsible for such delay;
- That the delay affected the critical path;
- That the delay qualifies for time and cost as per the conditions stipulated in the Contract;
- That the Contractor suffered additional expenses which were not envisaged at the time it entered into the Contractual framework with the Employer

The Contractor should maintain detailed and accurate contemporaneous record such as the baseline and updated/impacted/as-built programmes, joint record of delay events, correspondences exchanged between the parties etc. in order to support his Claim. The Contractor should also present a detailed forensic delay analysis to support its claim for Extension of time by demonstrating the extent of critical delays faced on the Project. There are various delay analysis techniques prevailing globally in the Construction sector namely,

- Impacted As-Planned Analysis;
- Time Impact Analysis;
- Time Slice Windows Analysis;
- As-Planned versus As-Built;
- Retrospective Longest Path Analysis;
- Collapsed As-Built Analysis.

The choice of delay analysis to be deployed should be determined by multiple factors such as the governing conditions of the Contract, nature of the causative events, nature of the Project, quality of construction programme and extent of records etc.

For the cost claim pertaining to compensation of time, the Contractor should claim time related indirect expenses at the time critical delays were faced on the Project. Whereas, the Employer's cost claim generally contains the Liquidated Damages expressly stipulated in the Contract.

Presenting a claim of Disruption
In order to claim disruption in a Project, the Contractor needs to prove that its productivity has suffered due to impediments for instance, non-availability of proper access to reach Project site, Physical conditions encountered at site being different from what was envisaged at the time of bid etc. resulting in

underutilization of its resources resulting in monetary loss. The Contractor needs to prove the following:

➢ Disruptive events have occurred, resulting in lower productivity;

➢ The events were not envisaged at the time bid was submitted by the Contractor;

➢ The events were responsibility of the Employer;

➢ The events entitle the Contractor for compensation.

Similar to the case of delay, contemporaneous records should be maintained for claiming disruption. The Contractor here needs to have a legal entitlement to claim for disruption with respect to the events reported by it.

There are various Disruption analysis techniques such as:

➢ Productivity-based methods
- Project specific studies
  - o Measured mile analysis
  - o Earned value analysis
  - o Programme analysis
  - o Work or trade sampling
  - o System dynamics modelling
- Project comparison studies
- Industry studies

➢Cost-based methods
- Estimated vs. incurred labour analysis
- Estimated vs. used cost analysis

In claiming disruption, the Contractor needs to prove the cost it has incurred would have been lower if not for the disruption i.e., the planned cost was lower than the actual cost incurred on the Project. It is more likely a breach of Contract implying that the Contractor was prevented from carrying out its work according to the Contract and as-planned.

Significance of Distinction

Delay and Disruption both are inherently interrelated but distinct issues. A loss of productivity i.e., disruption can lead to delay and, if the impacted activities are on critical path, that can be critical delay. Similarly, a delay may result into disruption if the Contractor adopt acceleration measures to implement the Project which may lead to tasks being carried out at a lower productivity than planned and at higher costs. Both the issues can have overlapping monetary consequences as well.

The fundamental difference between delay and disruption is that both the claims are needed to be pursued individually as the basis of both the claims is different. The delay and disruption analysis both follow different methodologies. In delay analysis, the focus is on loss of time whereas in case of disruption analysis the focus is on loss of productivity, both resulting in financial damages.

In conclusion, knowing the distinction between delay and disruption will enable you to differentiate your claims in a better way, resulting in a better chance at getting them approved.

High Court hands down first ever merits judgment on international banking transfer rights under Lebanese law – Vatche Manoukian v Société Générale De Banque Au Liban S.A.L and Bank Audi S.A.L

by Graham Shear, partner, Andrew Street, senior associate and Irina Tuca, trainee solicitor at Bryan Cave Leighton Paisner LLP

Summary

Following the recent decision of the High Court, in which specific performance was ordered against two Lebanese banks in favour of our client, Vatche Manoukian, the Court has now handed down its fully reasoned judgment.

The judgment in favour of our client is ground-breaking in being the first full merits judgment in any jurisdiction on the international transfer rights of banking customers under Lebanese law. That issue is likely to be of very real interest to all customers of Lebanese banks, but particularly those who can bring claims in the UK or EU under consumer legislation.

The High Court considered whether two Lebanese banks in this case had an obligation to effect the international bank transfer requested by our client, Mr Manoukian. The Court interpreted the terms and conditions of the two banks in accordance with Lebanese law, and considered the impact of custom on the contracts with banks.

In finding in favour of our client, the Court held that Mr Manoukian had a right to an international transfer, thus being entitled to an order for specific performance. That finding was based both on the terms of the contracts but also the wider issue of Lebanese banking custom which is incorporated into contracts under the Lebanese civil code.

Vatche Manoukian v Société Générale De Banque Au Liban S.A.L and Bank Audi S.A.L

Lebanon's economic crisis stimulated Lebanese banks to introduce restrictions on customers, limiting their ability to send money out of their accounts. Mr Vatche Manoukian, a dual national of Lebanon and the United Kingdom, was one of the depositors impacted by the banks' introduction of capital control.

In late 2020, we issued a claim against Bank Audi S.A.L, Lebanon's largest bank, and Société Générale De Banque Au Liban S.A.L (SGBL) on behalf of Mr Manoukian in the English High Court based on the court's jurisdiction over consumer contracts entered into by UK residents. We primarily sought an order for specific performance requiring the two banks to execute the transfer requested by Mr Manoukian.

Facts and background

At the outset of the crisis, our client, Vatche Manoukian, made a number of written request for Bank Audi and SGBL, where he held accounts, to execute international transfers from these accounts in Lebanon to accounts held outside of Lebanon.

Mr Manoukian's main claim was that the two banks were contractually obliged to effect the transfers which he had requested. His claim therefore focused on the Lebanese contracts and customs, which entitle depositors like Mr Manoukian to instruct banks to execute international transfers in the course of normal banking arrangements.

The banks pleaded that there were under no obligation to make the transfer, whether contractually or as a matter of Lebanese customary law. Given Lebanon's economic crisis, the two banks argued that they were entitled to refuse to effect the transfers required by Mr Manoukian, invoking the uncertain financial climate.

The proceedings took place against the background of similar claims against Lebanese banks. Of particular relevance was the claim brought by Mr Bilal Khalifeh against Blom Bank. In defending Mr Khalifeh's claim, Bank Blom argued that it had discharged its debt to Mr Khalifeh by using Article 822 of the Lebanese Code of Civil Procedure ("LCCP") (also referred to as the 'tender and deposit' procedure). Under this procedure the debtor (in this case, the bank), will seek to tender payment in the form of bankers' cheques and then to deposit those cheques with a notary public in Lebanon.

In the Khalifeh case, Mr Justice Foxton held that the Article 822 tender and deposit procedure was effective in discharging Blom Bank's debt to Mr Khalifeh. However, a major difference between Mr Manoukian's claim and Mr Khalifeh's claim was that our client wished to obtain specific performance for the written international transfer requests he had made, whereas Mr Khalifeh instead brought a debt claim.

By the judgment, Mr Justice Picken ruled in our client's favour, holding that Mr Manoukian does have the international transfer right that he has asserted, and thus he was entitled to specific performance.

Issues
The primary issues before Mr Justice Picken included:

1. Whether Mr Manoukian had a right to an international transfer under the contract with the banks, as interpreted by reference to Lebanese law and custom;

2. The impact of the LCCP Article 822 ('tender and deposit') procedure on Mr Manoukian's claim.

The transfer right issue (1)
Lebanese law governed the contracts between Mr Manoukian and the two banks. Mr Justice Picken therefore applied Lebanese law in interpreting the relevant clauses in relation to the issue of whether there was an obligation for the banks to effect the international transfer. Significant Lebanese law evidence was heard from the parties' appointed experts.

(a) General principles of interpretation under Lebanese Law
In interpreting the contracts in this case, Mr Justice Picken noted that the Lebanese general principles of contractual interpretation are very similar to those applicable under English law.

For example, the court looked at Clause I/A/b/2 of SGBL's Terms and Conditions, which stated that the "account holder has the right to request SGBL to make any transfer to another account". In disagreeing with SGBL's argument that this provision merely entitled the customer to ask for a transfer, Mr Justice Picken interpreted the clause on the basis of the rule against surplusage, concluding that that "a right to ask that there be a transfer must entail a right to that transfer being made".

Similarly, the Court also applied the principle that a contractual clause should be interpreted in the light of other contractual provisions. The fact that SGBL's Terms and Conditions specifically set out the circumstances where international transfers can be refused was held to indicate that those are the only exceptions, and that, by implication, in any other situation not caught by the exception the customer does indeed have a right to an international transfer.

After concluding that the contracts, correctly interpreted, provide for a right of international transfer, Mr Justice Picken considered if, and to what extent, custom affects this interpretation.

(b) Custom as an aid to interpretation under Lebanese Law
Article 371 of the Lebanese Code of Obligations and Contracts (LCOC) provides that a judge must apply established 'customary provisions' into the contract, even if these are not expressly incorporated, unless they are contradicted by the terms of the contract.

The banks ultimately conceded that custom is incorporated into the banks' terms and conditions. However, they argued that the right to an international transfer granted by custom is not absolute, but rather subject to limitations. The banks in this case contended that "the bank[s] had a legitimate right not to make the transfer". Our client's case was that while the right is not absolute, the situations in which a transfer can be refused are limited (in particular to insufficiency of funds and suspicion of money laundering).

In assessing the expert evidence, Mr Justice Picken preferred Mr Manoukian's expert, Mr Najjar, whose position was that the obligation to make the transfer is not subject to the loose exception of 'legitimate reason'. Mr Justice Picken agreed with Mr Manoukian's case that such a wide exception would 'water down' down the concept of an international transfer right to such an extent that there would be no obligation at all.

Second, the Court looked at Lebanese court decisions. Both experts agreed, and Mr Justice Foxton confirmed in his judgment in Khalifeh, that there is no doctrine of precedent under Lebanese law. The fundamental question before Mr Justice Picken was, therefore, whether 'a number of constant rulings' (as Mr Najjar called them in his expert evidence) can constitute 'jurisprudence' in the sense of a coherent body of law which can be treated as authority. Further, if the answer was yes, Mr Justice Picken also had to consider whether 'Urgent Matter Judge' decisions (i.e. cases where judges grant urgent relief in emergencies without determining the merits of the rights and obligations of the parties) could fall under the definition of 'jurisprudence'.

Mr Justice Picken answered 'yes' to both questions. He agreed with our client's expert that although (unlike English law) Lebanese law does not have a doctrine of precedent, a number of constant rulings will be accorded substantial weight by judges in determining what the legal position is on a given issue. Picken J further agreed with Mr Najjar that 'Urgent Matters Judge' decisions can be properly classified as jurisprudence and thus be given appropriate weight in assessing custom. The main reason for this conclusion was that, although these summary decisions are merely concerned with granting relief, a judge cannot grant relief without looking into the issue of merits, albeit without making a binding ruling on it. It was, therefore, appropriate to consider these rulings in so far as they were relevant for the issue of custom.

Mr Justice Picken looked at various 'Urgent Matter Judge' decisions, and the way they have been interpreted by the Lebanese Court of Appeal and concluded that the custom exists in the form contended for in our client's case. The right to an international transfer is not subject to a 'legitimate reason' exception, and banks' terms and conditions should be interpreted accordingly.

The LCCP article 822 (tender and deposit) issue (2)
By the time of the end of the trial, the Banks had abandoned their case that the LCCP Article 822 process would serve to negate any prior binding obligation to effect an international transfer. In that regard Mr Justice Picken noted "any tender and deposit would need to match the object of the debtor's obligation". Given his finding that the debtor's obligation was to effect the international transfer as requested by Mr Manoukian, the only conclusion was that engaging the tender and deposit procedure "entails a mismatch".

In other words, the LCCP Article 822 procedure may be effective in discharging a debt (as it was in the *Khalifeh* case), but it is ineffective in discharging the banks' obligation of effecting the international transfers. The procedure was therefore found to have no bearing on the question of whether an order for specific performance should be granted, a question which Mr Justice Picken ultimately answered in favour of our client.

Comments

The decision is the first full substantive merits decision holding that individual customers of Lebanese banks have a right to an international transfer as a result of Lebanese banking custom (subject to their contracts with banks not excluding such a custom).

Each case will turn on its particular terms and conditions, but this case concerned two of the biggest banks in Lebanon and many others will share the same standard terms and conditions as Mr Manoukian.

The case also confirms that the LCCP Article 822 tender and deposit procedure is no answer to a prior international transfer which has been made by a customer.

Other customers of Lebanese banks who have jurisdiction to bring consumer claims in England and who have made international transfer requests of their Lebanese bank are likely to be able to rely upon the findings of Mr Justice Picken in bringing their own cases.

BCLP instructed counsel Daniel Toledano QC, Bobby Friedman, and Caspar Bartscherer on the case.

Case details

- Court: High Court of Justice, Queen's Bench Division
- Judge: Mr Justice Picken
- Date of Judgment: 25 March 2022

Link to Judgment:
https://www.bailii.org/ew/cases/EWHC/QB/2022/669.html

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High Court Considers Unlawful Means Conspiracy Claim in the Context of a Repo Fraud

by Ceri Morgan, Professional Support Consultant, Nihar Lovell, Professional Support Lawye and Phoebe Fox, Associate at Herbert Smith Freehills
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The High Court has found in favour of a global financial brokerage business in its claim for unlawful means conspiracy against several businesses and individuals in the context of a repo fraud: *ED & F Man Capital Markets Limited v Come Harvest Holdings Limited & ors* [2022] EWHC 229 (Comm).

The decision will be of broader interest to financial institutions who may have been victims of a fraud perpetrated by a counterparty, or when defending mis-selling litigation, where allegations of unlawful means conspiracy are commonly included as part of a suite of claims.

While the decision did not involve new law, it serves as a reminder of the principles underpinning the tort of unlawful means conspiracy, and provides a useful application of the test set out in *Kuwait Oil Tanker v Al Bader & ors* [2000] EWCA Civ 160. Of note is the court's view is that in pursuing a claim for unlawful means conspiracy: (a) there can be different levels of intentionality involved when assessing whether there has been an intention by the fraudster(s) to cause harm; (b) it is not necessary that a party prove that the perpetrator(s) must have directed their actions towards a specific claimant, as opposed to a third party or class of persons more generally; and (c) blind-eye or Nelsonian knowledge (i.e. where a party abstains from inquiry because they do not wish to confirm a particular state of affairs which they believe likely to exist) may be sufficient to establish intention to cause harm.

In the present case, the court was satisfied that the defendants knew that the global financial brokerage was an intended victim of the unlawful means conspiracy, and if this had not been the case, the court noted that it would have found that the defendants had blind-eye knowledge. They also knew it was the global financial brokerage who would suffer loss.

We consider the decision in more detail below.

Background

Between May and October 2016, the claimant global financial brokerage business (MCM) entered into 28 sale and repurchase transactions. The counterparties to the transactions were 2 Hong Kong companies (together, the HK Companies). As part of the transactions, MCM received 92 purportedly genuine original warehouse receipts (Purported Receipts) purporting to give a right to title to parcels of nickel issued by the warehouse storing such metals. MCM consequentially provided finance to the HK Companies via its own sub-sale of 83 of the Purported Receipts to an Australian financial services company (ANZ).

When it later transpired that the Purported Receipts were forgeries which did not confer title to any nickel, MCM brought an unlawful means conspiracy claim against the HK Companies on the basis that it had been left seriously out of pocket for the monies it had advanced. MCM also added the following parties as defendants to the claim: (a) the sole director and shareholder of the HK Companies (Mr Wong); (b) the agent and adviser of the HK Companies (Genesis); (c) the sole director and shareholder of Genesis (Mr Kao); and (d) a Singaporean brokerage (Straits).

MCM's case was that Straits either knew or consciously decided not to enquire as to how the HK Companies, Mr Kao and Genesis were obtaining finance from MCM, ANZ and other financiers using the Purported Receipts. If they chose not to enquire, MCM submitted that this was a situation where the test for *"blind-eye"* or Nelsonian knowledge (i.e. refraining from making enquiries when suspicious) was satisfied.

However, Straits contended that there was no (documentary or otherwise) evidence that it had any knowledge of the fraud perpetrated on MCM; nor did it have blind-eye knowledge. Rather, it claimed that it was itself misled by Mr Kao and at most *"with the benefit of hindsight as perfect vision"*, it could be said that Straits missed a number of *"red flags"* in regard to Mr Kao and his associated companies.

Decision

The court found in favour of MCM, holding that the defendants had conspired to injure MCM by unlawful means.

The key issues which may be of broader interest to financial institutions are set out below.

Test for unlawful means conspiracy

In reaching its conclusion, the court noted that the tort of conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so (as per Kuwait Oil Tanker).

A combination or understanding between two or more people

The court found that there was a combination, understanding or agreement between the CEO and Vice President of Straits, Mr Wong and Mr Kao that Straits should carry out certain steps as part of the wider fraud. The basis upon which this conclusion was reached was fact specific and related to the state of certain defendants' knowledge. However, it is notable that the court found that the *"overt acts"* of Straits were themselves strongly suggestive of a conspiracy, and what is more, the implausible explanation offered by Straits' witnesses and "untruthful attempts" in evidence to explain away the part Straits played only provided further "compelling evidence" in support of Straits' involvement.

Intention to injure

In regard to this element of the tort, Straits sought to contend that the defendant must have directed their actions towards a specific claimant, as opposed to a third party or class of persons more generally, and mere recklessness as to injury to the claimant was not sufficient. However, MCM maintained that this was not supported, and in fact contradicted, by the authorities cited.

The court referred in its analysis on this point to *OBG v Allan* [2007] UKHL 21, where the House of Lords considered the level of intentionality required to establish liability, and highlighted the distinction between ends, means, and consequences. In summary: (i) ends, where harm to the claimant is the end sought by the defendant, then the requisite intention is made out; (ii) means, where the harm to the claimant is the means by which the defendant seeks to secure his/her end, then the requisite intention is made out; and (iii) consequences, where the harm is neither the end nor the means but merely a foreseeable consequence, the requisite intention is not made out. The court then went on to note that there was another category, known as "the other side of the coin", to consider if harm to the claimant was the necessary consequence of the defendant's actions. This was differentiated from category (iii) on the basis that the defendant's gain and the claimant's loss are inseparably linked and the defendant cannot obtain the one without bringing about the other, and the defendant knew this to be the case. In such circumstances, then although the purpose of the defendant's action was not to harm the claimant, they will be considered as having intended to harm the claimant.

The court also noted that there was no additional requirement that the precise identity of the victim be required at law to establish the requisite intention.

The court acknowledged the overlap between intention and knowledge and in particular, the fact that blind-eye or Nelsonian knowledge may be sufficient, which strengthened the view that there can be no requirement to intend to harm a specific claimant (because, in a case of blind-eye knowledge, no inquiry would have been undertaken to confirm the state of affairs, such as the identity of the claimant).

In any event, the court found on the facts that Straits knew that MCM was an intended victim of the unlawful means conspiracy at least from or shortly prior to April 2016, and if this had not been the case, the court noted that it would have found that the CEO and Vice President of Straits had blind-eye knowledge.

Similarly, the court found that the HK Companies, Mr Kao, and Genesis entered into a combination with intent to injure MCM by deceit. In the court's view, they knew it was MCM who would suffer loss.

Unlawful means

The court agreed with the parties that there were two constituent parts to this element of the tort, namely (i) the unlawfulness of the act; and (ii) whether the unlawful act is in fact the *"means"* by which injury is inflicted. Straits contended that the *"indeed the means"* component of the tort was made up of two aspects, causation and intention, and that this requirement of *"intention"* was in addition to the separate requirement that the defendant had intent to injure the claimant (considered above). By contrast, MCM maintained that in fact the *"indeed the means"* concept went to the unlawful means and causation elements of the tort, but not intention.

The court held that MCM's analysis was correct and confirmed that there was no intention requirement to this component of the tort. It found that MCM had sufficiently met the required threshold, given that Straits knew about the forgeries (although it was noted that the defendant is not required to know the specifics of the "unlawful means" deployed).

Loss

On the question of loss, the court considered there to be no doubt that MCM had suffered loss as a result of the unlawful means.

Fashion - Flagrant Copying Leads to Substantial Damages

by Fergus Brown, Trainee Solicitor, Stevens & Bolton

Damages inquiries, in which the court calculates the amount of damages payable, are relatively rare in intellectual property cases because the parties usually settle the quantum of damages between themselves once the judgment on infringement has been given.

In many cases also, the claimant's main concern is to obtain an injunction keeping the infringements off the market. However, as was illustrated in the recent case of Original Beauty v G4K Fashion involving fast fashion "bandage" and "bodycon" dresses[1], damages can be substantial especially if copying is flagrant. The case provides a good illustration of the robustness with which the court calculates damages and of the principles applied. In this case these principles led to a substantial award of damages, but it is important to note that this will not always be the case[2]. So having a reality check on this issue at an early stage is often a good idea.

Damages in the case of Original Beauty v G4K Fashion – how the calculation works

On 24 February 2021[3] the high court ruled that the defendants had infringed the claimants' unregistered design rights in respect of the claimants' "bodycon" style of dresses.

The court also found that the defendants' had copied the garments in question in a manner flagrant enough to justify the award of additional damages (including by sending images of the claimants' products to their factories to be copied).

Following a damages inquiry, the court awarded the claimants damages totalling over £450,000. To reach this figure the court addressed three heads of damages, namely:

1. standard damages in respect of the claimants' lost profits on garments which, but for the defendants' sales, would have been made by the claimants;

2. a reasonable royalty on the defendants' remaining sales; and

3. additional damages pursuant to the court's earlier finding of flagrant copying.

Standard damages:

In reaching its conclusions regarding standard damages, the court provided a helpful reminder of the following underpinning principles of standard damages:

1. damages are compensatory and should be assessed liberally. The aim should be to put the claimant in the position they would have been in had the defendants' infringing acts not occurred rather than to punish the defendants;

2. it will be for the court to form a view and determine what proportion of the defendants' sales would have been made by the claimants;

3. any reasonable royalty figure should be assessed as the figure that a willing licensor and licensee would have agreed by referencing truly comparable licences (if any), or by apportioning profit generated from infringing sales.

Given that the above all required the court to make assumptions as to the specifics of a hypothetical world, namely one where the defendants' infringing acts had not occurred, the court acknowledged that there was not much to be expected in the way of accuracy and that the court would have to "do the best job it can with the material the parties have put forward before it" whilst also applying common sense and fairness.

Loss of profit:
The court applied a probability factor to determine what proportion of the defendants' infringing sales the claimants would have made if the defendants had not been infringing their rights.

The court concluded that 20% of the defendants' sales were sales that the claimants were seen to have lost and awarded the claimants damages of £74,847.92 for loss of profit.

Reasonable royalty:
Damages to be based upon a reasonable royalty were then applied to the remaining 80% of the infringing sales.

The court heard expert evidence by way of forensic accounting but ultimately concluded that it was unhelpful and that it was for the court to assess the "hypothetical negotiation" in order to determine a reasonable royalty.

The court considered multiple factors specific to the commercial context of the case, including pricing practices and relevant business models, and concluded that a reasonable royalty in this context would be 10% of the defendants' sales subject to a minimum royalty of £4,000 per design.

The total reasonable royalty sum awarded was £75,267.64.

Additional damages:
Finally, the court turned to additional damages, commenting that they may be punitive in order to act as a deterrent to other would-be infringers while noting that although they must be effective, proportionate and dissuasive they must not be an abuse of power.

The court ruled that an uplift of 200% on the standard damages was appropriate and as such awarded a sum of £300,000 in additional damages. In reaching this figure, the court considered the scale and flagrant nature of the defendants' infringements as well as their conduct throughout the proceedings.

Deterrent effect
Although damages inquiries are rare in the context of IP proceedings, this decision should act as a strong deterrent to potential infringers who are contemplating copying a competitors design.

An award of additional damages of this size clearly demonstrates that potential infringers could be left out of pocket by way of punitive damages should they be found to be guilty of flagrantly infringing another's rights.

References

1. *Original Beauty and others v G4K Fashion and others* [2021] EWHC 294 (24 February 2021)

2. For a case in which only nominal damages were awarded, see Marathon Asset Management LLP and another v Seddon and another [2017] EWHC, a breach of confidence case involving ex-employees

3. *Original Beauty and others v G4K Fashion and others* [2021] EWHC 3439 (21 December 2021)

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Why isn't Transferring Health Data Across Borders for Research Purposes Easier?

by Victoria Hordern

Following the last two years of living through a global pandemic, many governments and businesses have re-committed to investing heavily in understanding and treating disease.The devastation brought by the COVID-19 pandemic has served as a signal lesson in the need for better disease detection and treatment preparedness.

One of the strengths of the last two years has been the way scientists were able to act promptly to research and design suitable vaccines and treatments. None of this could have taken place without researchers and innovators being able to share ideas and data. So why, in light of the significant public benefit that such data sharing for research purposes can bring, isn't it easier to transfer health personal data across borders in line with data protection rules?

Why are the available solutions challenging?
Many organisations are concerned about the rigidness of the law in this area. In its submission to the UK Parliament's Science and Technology Committee, Health Data Research UK (HDR UK), the UK's national institute for health data science highlighted a central issue: the nature of research is necessarily global but the additional steps required under EU/UK data protection law, including complex Transfer Impact Assessments (TIAs) and the lack of suitable transfer tools, can lead research projects to be delayed or cancelled.

UK and EU international data transfer rules start with the position that it's better to transfer health data to countries that are considered to have data protection regimes which provide an equivalent, or adequate level of protection under applicable EU or UK law. However, the list of adequate countries is fairly limited and countries have historically only been added after rigorous scrutiny.

Public bodies that UK/EU researchers want to partner with in countries which do not benefit from an adequacy decision have to enter into a recognised data transfer solution. They may well object to entering into the Standard Contractual Clauses (SCCs) (the most widely used tool for cross-border transfers from the EU) given the specific assurances that they would have to agree to or for conflict of law reasons. The SCCs' very inflexibility - they were conceived and drafted mostly with the private sector in mind - can be unsuitable for arrangements with third country public or non-profit bodies. While the European Commission has the power to adopt further standard contractual clauses so could choose to draft a set of clauses more suitable for exporters transferring data to third country public sector bodies, this outcome seems unlikely.

A handful of life sciences and healthcare companies have embraced Binding Corporate Rules (BCRs) to make data exports lawful. BCRs provide a reliable long-term solution but require time and resource investment and are not an overnight solution.

With drawbacks to reliance on both SCCs and BCRs, many businesses involved in health research (especially small and medium sized companies), find identifying a suitable lawful solution for data transfers from the EU or UK to third countries frustratingly difficult.

In post-Brexit UK we may soon begin to see elements of divergence from the EU list of adequate countries approved by the European Commission. The UK government's announcements in late August 2021, set out a priority list of destinations for future adequacy findings (including the USA, India and Korea). So, while we are still waiting for a replacement for the Privacy Shield (which was ruled invalid in July 2020) to cover data exports from the EU to the USA, we may see progress towards a UK-US data transfer agreement sooner. It's noteworthy that one of the specific case studies cited by the UK government in its paper related to facilitating health research since "international agreements on data will make it easier for UK scientists to conduct trials with diverse, global patient data sets".

The Schrems II curveball
Even if reliance on SCCs or BCRs as a transfer tool is possible, due to Schrems II requirements the parties intending to transfer health data must also carry out a TIA to consider whether the transfer will benefit from an essentially equivalent level of protection. There's no specific TIA template produced by European regulators but a number of factors need to be considered.

Unfortunately there are currently differing views as to whether the TIA can be considered to take sufficient account of risk and how much weight can be given to the likelihood of a third country public authority requesting access to the data. The French administrative supreme court, the Conseil d'Etat, in the Health Data Hub case (October 2020) did accept that the actual risk of a US court/public authority requesting access to health data was low because health data is not considered useful for criminal or anti-terrorism purposes. But many EU data protection authorities

seem to be taking a more absolutist approach to the transfer of (any) data to the US - witness the recent decisions concerning the transfer of data to the US using Google Analytics.

Other approaches to transfers
If transfers of health data cannot rely on an adequacy decision, and if the parties do not have BCRs in place and SCCs are not appropriate, what alternatives are available to export health data?

One option could be to not transfer personal data at all – instead, to effectively anonymise the data so that its use falls outside data protection law. Easier said than done, of course. Many life sciences companies and health researchers need to be able to clearly link data to an identity (even if coded) to ensure full utilisation of the data. And even if the data used is pseudonymised, it remains personal data under data protection law. Other transfer tools theoretically exist under the (UK) GDPR – Codes of Conduct, for instance – but so far no life sciences or healthcare industry sector has successfully obtained approval of a code for data transfers.

This leaves parties falling back on the permitted derogations to the restrictions on data transfers. Derogations are considered a last resort and are designed for one-off transfers since they do not guarantee the protections provided by adequacy, SCCs and BCRs. It therefore seems unlikely that a data protection authority or court would consider a derogation (such as the transfer of health data being necessary for important reasons of public interest) to be available for bulk, regular transfers of health data.

Of course, if data protection and judicial authorities decided to interpret this derogation more broadly – that transfers for health research are transfers for important reasons of public interest – that would provide greater certainty. And here we come to a complication. While the (UK) GDPR allows for the use of health data for scientific research purposes or for reasons of public interest in the area of public health (under Article 9), those lawful bases are not mirrored in the context of grounds (or derogations) for data transfers (under Chapter V). Those in charge of drafting the derogations did not consider a derogation specifically for data transfers for scientific research in the public interest to be a necessary or suitable addition.

UK adequacy findings
If the UK government decides to grant adequacy regulations (the UK's version of EU adequacy decisions) to a number of the key countries in the life sciences space – such as the USA and India – the regulatory environment will shift dramatically in the UK so that such transfers of health data can be made without reliance on a transfer tool under the UK GDPR and without the need to complete a TIA. However, if the UK does go this way, it needs to be confident it can demonstrate to the EU that such adequacy assessments of these third countries are robust.

In its January 2022 paper 'The Benefits of Brexit', the UK government makes much of the freedom it now has to strike new data adequacy partnerships to provide new data flow deals which will allow services to be provided more reliably, securely, faster and cheaper. However, as organisations are already underlining, this must be balanced against the imperative of retaining the UK's own adequacy status from the EU which could be in peril if the UK deviates substantially from EU standards.

A risk-based approach
Of course, it's plausible to argue that transferring health data cross-borders shouldn't be easy since such data deserves greater protection. In other words, it is because the misuse of this data can lead to greater harm for individuals, that transfers of such data should be subject to stricter rules.

Unfortunately, it's certainly the case that hackers regularly target health data rich organisations. But that's principally a data security consideration, and not linked to the cross-border transfer regime under Chapter V of the (UK) GDPR. Indeed, the most recent complication concerning data exports – the fallout from the Schrems II decision - isn't particularly targeted at sensitive data like health data. The focus of the Court of Justice of the European Union in Schrems II was on the powers of foreign public authorities to access any personal data protected by EU data protection law. So, if there is widespread acceptance that public authorities dealing with serious criminal and terrorist threats are highly unlikely to target the life sciences sector with data requests (since health data is rarely used for these purposes), then this would logically lead to the conclusion that there is a comparatively low risk attached to the transfer of health data to importers outside the EU/UK.

Medical researchers make the powerful argument that global shared analysis of data from a variety of countries is necessary for sufficient statistical weight to be achieved in the study of rare diseases and the development of new treatments. If scientists cannot obtain enough data for analysis, this can reduce the effectiveness of their research and ultimately impoverish all of us due to the missed opportunities for medical breakthroughs.

It is unfortunate that there isn't greater certainty from regulators that those using health data, and especially those operating in life sciences research, can lawfully transfer health data cross-border to pursue their research-related purposes when they can demonstrate there are robust security measures in place and a lack of interest from third country public authorities in accessing this data.

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Playing Catch-up with the UK's Dirty Money

by Syed Rahman, Partner, Rahman Ravelli

The much-lauded, heavily-anticipated economic crime bill has become law. To give it its full title, the Economic Crime (Transparency and Enforcement) Act 2022 has become the government's considered attempt to halt the flow of dirty money to these shores. Given that everyone with a passing interest in financial crime has been aware of the situation for years, the fact that it took one nation invading another to make the Act a reality doesn't reflect well on anybody involved.

But what we do, finally, have is the creation of a register that will show the genuine owners of the overseas companies that have control of some of the UK's most valuable assets. It will cover any purchases of property in England and Wales over the last 20 years – and since December 2014 in Scotland – by any non-UK entity. The retrospective nature of this will certainly make it more useful in targeting funds of dubious origins and bring greater openness to such transactions. Any praise that could be given for this, however, should be tempered by the fact that legislation to introduce such a register was drafted and then dropped in 2018.

It is also four years since unexplained wealth others (UWOs) became an option for law enforcement agencies. Critics of them would argue that they may as well have been shelved in 2018 also, for all the impact they have had. And yet the new Act has given more steel to the UWO regime. The time agencies have to investigate material received in response to an unexplained wealth order before discharging any interim property freezing order over the assets in question is rising from 60 to 186 days. And procedures have been put in place to ensure these organisations do not face the prospect of paying unlimited legal costs if an application for a UWO is not successful. This latter change will be a good incentive to utilise UWO's, as law enforcement agencies will not be penalised when their application fails. But given the history of UWOs to date, it may well have been better to have these measures in place from the time they became a reality.

Jump Start

The Act seems to have attempted to jump start two vehicles for the authorities in their race to catch up with the dirty money in the UK. In the case of one of these – the comprehensive overseas register – it is the first time it has been up and running. UWOs, however, have been an idea that appears to have stalled in recent years.

Brought in as part of the Criminal Finances Act 2017 and available to the National Crime Agency (NCA), Serious Fraud Office (SFO), Financial Conduct Authority (FCA), HM Revenue and Customs and even the Director of Public Prosecutions from the following year, hopes were high for UWOs. Allowing the authorities to target assets believed to have been obtained illegally, UWOs can be used against individuals who have not been convicted or even charged with an offence. Yet so far, they have been used in only four cases. Only the NCA has used them – and the last time it obtained one was 2019.

It now remains to be seen if the new Act's efforts to make UWO's a more attractive option has the desired effect - or is simply a belated effort to breathe life into an idea that has had its day. A quick glance at the track record of UWO's until now indicates that a carefully-planned and conducted response can nullify the threat of one. If the Act's UWO Version 2.0 approach proves to be stacking the odds in favour of the authorities, we may see UWOs on a more regular basis. But that, at this stage, is one nighty big "if".

Tightening

As a response to Russian aggression, the Act represents a tightening of the screw by a government that is looking at the most viable means of targeting those with Kremlin links. The government is looking to move quicker and more effectively when it comes to sanctions, and this Act will be of use in this.

One aspect of the Act that will be of particular help is the removal of the need to show that a corporate or individual knew or had reasonable cause to suspect that their conduct breached a sanction, in order for them to be penalised by OFSI (the Office of Financial Sanctions Implementation). This could lead to more civil enforcement action against companies and individuals. Financial institutions, such as banks, may also now find themselves in the spotlight, with law enforcement agencies asking them why their own due diligence procedures didn't pick up on the allegedly illicit funds. But there can be no escaping the fact that some of the measures that have now become law under the Act could have been in place much earlier. The Act may well prove to be effective and of great value. But it represents, nonetheless, a very hurried and overdue attempt to play catch-up.

How Effective are the FCA's Criminal and Civil Powers to Combat Money Laundering?

As the Financial Conduct Authority uses its powers of criminal prosecution for the first time in a money laundering case against NatWest, barrister Olivia Dwan sets out the agency's civil and criminal powers below.

The Financial Conduct Authority (FCA) has a wide range of civil and criminal powers to crack down on money laundering committed by UK-based individuals and companies working in financial services.

While the agency's ability to bring civil cases for money laundering is long-established, it was only in March 2021 that the agency brought its first criminal prosecution, against NatWest.

With a fine of over a quarter of a billion pounds, the NatWest case was a significant win for the agency. But how indicative is this case of the agency's future strategy? How effective are the FCA's criminal and civil powers? And what action should anyone facing the prospect of an FCA investigation take?

FCA's powers of criminal prosecution

The FCA gained the power to prosecute alleged money launderers under the Money Laundering Regulations 2007 (MLR 2007).

The Money Laundering Regulations apply to financial institutions, legal professionals and other professionals such as auditors, accountants and credit institutions in the conduct of general business and transactional work. This selection of individuals is known as "relevant persons" within the regulations.

The regulations create a single offence under regulation 45 MLR 2007 of failure to comply with a requirement made by one of the regulations. The offence may be committed where any one of the following eight requirements are not met:

- the requirement to apply due diligence
- the requirement to conduct ongoing monitoring of a business relationship
- the requirement to carry out customer verification
- the requirement to carry out customer due diligence
- the requirement to carry out enhanced due diligence
- the requirement to keep records
- the requirement to maintain appropriate and risk-sensitive policies and procedures
- the requirement for employee training and awareness

The standard defence available for the failure to comply offence can be made out if the relevant person can prove that they took all reasonable steps to follow relevant guidance at the relevant time and exercised all the due diligence possible to avoid committing the offence.

Relevant guidance will include any guidance issued by a supervisory authority such as the FCA, and any guidance approved and published by the Treasury.

If the FCA suspect a relevant person has failed to follow relevant guidance, a formal investigation may begin.

In recent years the FCA has widened its remit beyond chief executives to staff at lower levels. The relevant person is usually notified of an investigation by service of a Notice of Appointment which provides a broad outline of the investigation and the period being investigated. The FCA then begins an evidence gathering exercise by which it recovers documents and conducts interviews. The agency has a wide range of powers to seize and access material in respect of this.

Most cases are open to resolution in both the civil and criminal courts at the evidence gathering stage. However, regulatory investigations can evolve into criminal investigations where the relevant conduct is considered serious, and the monetary remedies and injunctions available in the civil courts are not considered adequate avenues to resolve the case.

If a relevant person is notified of an investigation against them, they must seek specialised legal advice as soon as possible. This is because the position of the individual can be protected at a much earlier stage with the intervention of a lawyer. Decisions made at the outset as to disclosure and potential cooperation can be critical.

The NatWest case

Despite being on the statute book since 2007, it wasn't until March last year that the FCA announced its first criminal prosecution for breaching Money Laundering Regulations.

The agency alleged that NatWest had failed to properly monitor suspicious activity by its customer Fowler Oldfield, a Bradford-based gold dealer. It alleged that the jeweller, which had been shut down in

2016 after a police investigation, deposited £365m at 50 different branches of the High Street bank over a five-year period. These deposits included £264m in cash, which at one point came into the bank at a rate of £1.8m a day. At least £700,000 was transported to the bank in bin bags.

NatWest pleaded guilty to the charges in December 2021. It was fined £264.7m, ordered to repay £460,000 to cover any financial benefit, and pay legal costs of £4.2m.

Although the facts of this case, and the short period of time between charge and conviction, may give the impression that the NatWest prosecution was a 'slam dunk' for the agency, an exchange of letters between the agency and Parliament's Public Accounts Committee shows it actually took a significant amount of work.

Responding to a question about why it took the FCA five years to bring the prosecution following police investigation, the agency's CEO Nikhil Rathi said the NatWest probe had taken 30,000 staff hours, had involved compelled interviews with 85 witnesses, forensic reviews of 300,000 documents and 350 separate rounds of legal correspondence.

It could be said that the large fine applied to NatWest as a company would do very little to deter individuals from failing to meet regulatory standards in future. However, there has been undoubtable damage to NatWest's reputation which may force a culture change within the company and its competitors to ensure no further investigations are brought.

Cases such as this emphasise a clear need for corporates to ensure they keep adequate records of all decision making which could be caught by the regulations such as 'Know Your Customer'checks, due diligence and protocols relating to beneficial ownership. These are likely to be beneficial should an investigation arise, and may help individuals and firms to cooperate in interviews, or should the worst happen, as mitigation on sentencing.

The FCA's civil penalty powers

In contrast to its criminal prosecution abilities, the FCA is far more practiced in its use of civil powers to impose fines and censures on firms and individuals under regulations 76(1) and (2) of the MLR.

It has imposed some hefty civil penalties. In June 2020, it issued a fine of £37.8m on Commerzbank London based on ineffective verification of beneficial ownership, particularly whether politically exposed parties were involved in transactions and a lack of protocol for termination of a customer relationship because of a risk of financial crime.

Commerzbank was also sanctioned for "substantial and unjustifiable" backlogs in updated 'Know Your Customer' checks. This was exacerbated by a lack of cohesion between paper records and updated digital systems. Interestingly, the FCA found that the updated systems themselves contributed to the continuing backlog.

The Commerzbank case serves the dual purpose of flagging the importance of risk management, but also early engagement with the regulator. The firm benefitted from a 30% discount on its fine owing to cooperation.

A second sanction of £96.6 million was imposed in conjunction with the Prudential Regulation Authority on Goldman Sachs International in relation to the arrangement of bonds for a Malaysian incorporated company which was the subject of serious embezzlement allegations. The deals were arranged by a team based in Asia but they were "booked" in the UK.

The FCA cited three key risk factors; large transactions within a compressed space of time, high risk jurisdictions, and the fact that a closely associated third party had been identified as high risk.

Although a separate committee approved the transactions, the FCA criticised the firm's reliance on the deal team's misrepresentations about the risks of the transactions on the basis that the team had an "evident interest" in the deals proceeding. Whilst the FCA acknowledged that the committee may have considered a censored version of events when assessing third party risk, it criticised the committee's failure to conduct a sufficient standalone assessment.

Here again, cooperation paid dividends. The firm secured a 30% discount on its fine. This penalty demonstrates the emerging threat of a UK branch of a bank being stung by the actions of a branch abroad.

Dire Warnings

The FCA has been forthright in its warnings to money launderers.

In March 2021 – and shortly before the announcement of the NatWest prosecution – Mark Steward, the FCA's Executive Director of Enforcement and Market Oversight, delivered a speech in which he warned of the severe consequences for firms who fail to enact 'purposeful' anti-money laundering measures.

"Detection, investigation and prosecution, where necessary – either civilly or criminally – of breaches of the Money Laundering Regulations are key priorities for the FCA", Mr Steward stated.

He went on: "Systems and controls that are purposeful, efficient and courageous in identifying suspicious activity are vitally important."

At the time of Mr Steward's speech, the FCA was running 42 separate investigations into allegations of money laundering by firms and individuals.

But in January 2022 the Financial Times reported that figure to be "about 40", of which two probes were criminal and six were "dual track".

Where to now?

The FCA's tough words on money laundering have, in some respects, played out. Mr Steward's hard-hitting speech in March last year was followed by the spectacular criminal conviction of NatWest.

But the evidence from the FCA suggest that even the NatWest conviction, with its striking evidential matrix, was not 'easy pickings' for the agency. It took a lot of investment of time and money from the agency to win the case.

Despite this, there should be no doubt about the FCA's willingness to prosecute.

Where the criminal standard of proof cannot be met for prosecutions, the FCA may turn back to their typical civil powers to seek monetary redress for failures to comply with the regulations.

Regardless, the penalties applied emphasise the fact that approval of transactions at committee level will not insulate an entire company from liability, and the ever-growing need for watertight systems and controls to be maintained and developed throughout financial institutions.

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www.hickmanandrose.co.uk

Meet the Team: Ann Kiernan

by Forensic Access

The field of firearms and ballistics is traditionally perceived as a man's world. However, if there's anyone to shake things up, it's our in-house firearms expert Ann Kiernan. Ann joined the company as a Senior Firearms Scientist in September 2021, and with over twenty years' experience in the field, she is a highly-skilled firearms and toolmarks expert.

Reflecting upon years of experience as an expert witness, Ann recalls the first time she dismantled a gun, and reflects on some challenging jobs in Afghanistan and Iraq.

When did you decide that you wanted a career in firearms?

"I joined Forensic Science Northern Ireland (FSNI) in 2001 after I finished my masters in forensics. The job opportunities in Ireland were very limited.

"You have to be a member of the Garda Síochána (the police) to work within the technical bureau. So I ended up working in a research and development (R&D) company first. I was actually working three jobs at the time, and I decided to stick with the R&D veterinary pharmaceutical company for just over a year – but then I realised it just wasn't for me. I wanted something more hands on.

"I applied for a job at FSNI and got a position within the evidence recovery unit. I was working in that section for nearly two and half years, and the opportunity then arose for someone in firearms. I transferred across to firearms, not knowing if it was for me or not… bearing in mind that I'm from the south of Ireland and this was up in the north, which was technically a 'no go' area because of the previous troubles. "My father wasn't happy that I was going to work in the north, but he let it go. I came home one Friday evening, went into the gun cabinet and started dismantling a shotgun. Of course, my dad said "seriously?!". It took me around a month to actually get the shotgun back together again, but I thought 'this is cool and I want to do this'.

"And that was that, I started my career in firearms! In just over eighteen months I was headhunted to go

across to the mainland UK, and I decided to go just for a year… which turned into eleven and a half years overseas, and despite being back on my home turf now, twenty years later I'm still UK-employed.

"I absolutely love it [firearms]. It's so different, it's hands-on. It's different now in that I don't get first dibs at the pie because I'm mostly doing review work, but I'm grateful for the experiences that I've had. I joined Forensic Alliance, which became LGC, which is where I worked with Angela Gallop. I have great admiration for her work and her cold case reviews."

What have been the most challenging parts of being a firearms scientist?
"The toughest parts were when I was in the midst of the Military cases, back in 2007-9, when we were the first port of call for the military deaths.

"There were days when we'd go down to the John Radcliffe Hospital in Oxford and assist with three or four post-mortems per day. It was quite intense, but I'd never have gained the experience that I have today if it wasn't for the intensity of those years.

"I was very lucky and fortunate to have such good mentors throughout my career, from Chet Park (RIP) to Ed Wallace. These two individuals rubber stamped my love for firearms. They mentored me, brought me on, taught me my boundaries and limitations… I'll never forget those lessons."

How has forensic science changed throughout your career?
"When I joined Forensic Alliance, the private industry was just developing. Forensic Alliance was the first private entity outside of the Forensic Science Service (FSS) in the UK, and then you had other companies popping up which resulted in the closure of the FSS.

"The whole structure of firearms investigations and forensics has changed dramatically. Since the closure of the Home Office's FSS laboratories, there's been a huge loss of expertise in the forensic fields because few people have the relevant experience to fill the positions.

"It's primarily because there is so much emphasis on turnaround times and quantity rather than the science itself. There's not enough resources there to keep the training/mentoring (junior staff) to a high level, which is an issue across the forensic market."

What does a normal day look like for you?
"Primarily I review cases now. They're cases that have already been investigated by the prosecution, so it's a solicitor or an advocate that contacts me because they have a client charged with XYZ – it could be a simple charge of possession of a firearm without any licence, or it could be something more serious like an attempted/fatal murder. The Crown Prosecution Service (CPS) will have received all the prosecution papers and the case is probably going to court next week, prompting the defence to think 'we need to review this and we need to get an answer.'

"They will ask me to review what the prosecution has done. It can be a paper review, or an independent examination of the items in question. In a paper review, I get all the documents required as part of a case and review a scientific report. By doing that I usually obtain a copy of the scientist's original examination notes and photographs, and essentially provide an opinion on whether I agree or disagree with their conclusions.

"In most cases, with regards to classification, I often agree, however there are areas where an item is wrongly classified. The firearms legislation in the UK is a complicated if you do not understand the different aspects of firearms, and the topic of debate is usually where the item falls within this and if it falls foul of it. The legislation changes constantly, so it's important to keep up-to-date with the changes so that correct advice can be given to the solicitors. Solicitors/Counsel want advice to argue mitigation, or interpretation of the legislation. This can lead to a lesser sentence or consideration of exceptional circumstances.

"The other aspect of my job which I love is cold case reviews. I've been working on quite a lot of Coroners cases from the seventies, which is challenging in itself because the scientific records are severely lacking in detail in comparison to the ones we have today. There are new techniques and there's also new recording processes. For example, the forensic casefile of a job that was done in the seventies might just contain a draft report - no exam notes, no pictures… and it makes you wonder how they reached the reported conclusions.

"It's a lot of looking for a needle in a haystack, because a lot of coroners inquests, especially Northern Ireland ones, are historical inquiries where the families are looking for answers. With coroners inquests, you have normally three experts per field instructed, one for the coroner, one for family and another for the Ministry of Defence (MOD). Sometimes, the evidence initially reported upon is no longer available to examine, and the jobs entail reviewing witness statements, photographs, revisiting the scene (even though the incidence happened over 50 years ago- visiting the scene to appreciate the layout and topography is vital in understanding the sequence of events, and possible trajectories). In addition, cold case reviews assists with understanding what was initially reported, and possibly identify areas that may not have been considered the first time round.

"You then have different experts. For example, in firearms you could have three pathologists - all acting for different parties. In most cases, we all come to a joint statement of facts."

What advice would you offer to someone who's new to the field?
"Be willing to learn from experienced peers, willing to accept challenges and be active in doing your own stuff on the side. Keep your research journals read, push for your training and get as much experience as possible."

"It's also important to learn from your mistakes and stick to your limitations within your field of expertise."

What is the most memorable case or scene that you've worked on?
"There are many. One of the main advantages of being a firearms expert is that sometimes you get called to attend to a scene, and as an individual, you are normally involved right until the very end. You get to learn all the different avenues the investigation is going in, and you present your evidence to assist the court in understanding the science of ballistics.

"All of the military cases I really enjoyed, because there was so much in them. I was working parallel with the pathologists.
"There are two particular cases that really stand out. I had a trip to Afghanistan and another one to Iraq. Both of those trips were milestones. I remember for the trip to Basra I had to sign a disclaimer that the company I was working for didn't want me to go. Naturally this was understandable because of the risks. Ultimately the company advised against it and didn't want me to go – but of course I was going!

"I was out in Iraq for three days, and I remember getting in a Black Hawk and being fired upon. You could see the shots coming at the helicopter, and it was a case of get out of the helicopter and run for cover. It was such an adrenaline rush!"

Do you prefer the practical aspects of your job, such as dismantling guns, or the review side of things?
"I still do hands-on, but I don't work on live scenes anymore. I do reconstruction. For example, some of those coroners cases will include revisiting a scene forty odd years later and trying to get the level of the land".

"With cold cases you need to take into consideration what has changed, what hasn't changed, the environment, and what could be done with the evidence now with new techniques available. Of course, the best part of my job historically was actually attending a live scene. This is because you get to appreciate what is happening, you get to record your response to the scene…ultimately if it's not recorded then it can't be relied upon – whether it's twenty years down the line or a defence expert coming along and reviewing it more recently.

"I really miss that part of it. I still do hands-on dismantling of guns if I'm undertaking an examination, but it's the live scenes and being in the midst of it that I enjoy."

What skills does someone in your field need to have?
"You need to have the background knowledge both theoretically and practically. You learn more hands-on in firearms and from peers than you will ever from a book.

"As a firearms expert, I have very close peers around the world, so I usually attend an international conference on an annual basis. I also have individuals I can contact around the world if I need to run something by them.

"I think it's important to have the aptitude to make those contacts and maintain those contacts, because it's important to always have someone to call upon to ask questions to. You must gain respect of those individuals to be included in their circle. It's a very small world and my advice would be to get as much practical hands-on experience as you can, and then use that experience to develop contacts."

How does Forensic Access compare to the other companies that you've worked for?
"Forensic Access seems to be a lot more personal which is good, I love that.

"I know many of the scientists at Forensic Access because I've worked with them in the past to some degree. So there are a lot of names that are familiar within the company, and I think the strong connection that Forensic Access has with the pathologists is incredibly beneficial."

Are there many women in the field of firearms?
"Our presence is growing! When I started, there were two. Alice Waters had just started in the UK at the same time I started, and now she's one of the head experts in the Metropolitan Police.

"It was very male oriented and dominated before that, but I think if you look at the US in comparison, there are now many more female experts compared to male experts. There are at least four female firearms experts in the Metropolitan Police, if not more, so it's onwards and upwards!"

Ann Kiernan
Senior Forensic Scientist (Firearms)
With over twenty years' experience working in the field, Ann is a highly skilled and dedicated firearms and tool marks expert.
Ann provides expertise in a variety of cases involving firearms, including the identification and legal classification of firearms, ammunition and associated items (under the provisions of the Firearms Act 1968, Northern Ireland Order 2004, The Firearms (Scotland) Rules and the Irish Firearms Act 1925), testing of weapons for functionality, examination of stun guns and taser devices and the examination of air weapons to determine their kinetic energy.

A Leap Forward in Corporate Liability & the Long Overdue Failure to Prevent Economic Crime Solution

by: Daniel Martin (JMW), Michael Goodwin QC & Anita Clifford (Red Lion Chambers)

Recent events in Ukraine and growing concern, both in government and among the general public, about illicit wealth in the UK have significantly increased the likelihood of a new failure to prevent economic crime offence being introduced. If this much talked about development does happen, then the offence poses big implications for businesses in all sectors.

The new Economic Crime (Transparency and Enforcement) Act received Royal Assent in the early hours of the 15th March 2022, following an unusually rapid passage through Parliament. This new Act does not contain provisions for a failure to prevent offence and focuses instead on the introduction of a new register requiring anonymous owners of UK property to reveal their identity, expanded sanctions liability and amendments directed at easing the path for authorities to obtain Unexplained Wealth Orders against suspected holders of illegitimate wealth. Pressure is mounting on the government, however, to take more action to tackle fraud, corruption and money laundering in the UK suggesting that the current Bill may be the precursor for a more substantive economic crime package later in 2022. In a sign of this growing pressure, on 26 January 2022 the Treasury Committee published its Economic Crime report which expressed "disappointment" that the government had yet to reform its approach to corporate criminal liability. The Committee's report expressly referenced a call by the Fraud Advisory Panel, an influential anti-fraud charity, to introduce a failure to prevent economic crime offence.[1]

The proposal is nothing new but in recent months there has been a noticeable shift in the surrounding discourse driven by increased public concern about fraud and other economic crimes in the UK. High-profile UK companies such as Carillion and Patisserie Valerie have fallen in the wake of fraud allegations. The Covid-19 pandemic since then has created fresh opportunities for criminal activity, in particular the Bounce Back Loan scheme that reportedly saw record levels of fraud in the order of £4.9bn[2],further pushing concerns about economic crime into the headlines.

According to UK Finance, fraud has risen to the level of a national security threat[3] in part due to the pandemic. The first half of 2021 saw a 30% increase in fraud losses compared to the same period in 2020 despite the efforts of the banking and financial sector.[4] Alongside all of this, the National Crime Agency continues to estimate that money laundering costs the UK more than £100 billion a year.[5] Amidst public concern a proposal to make it easier to hold companies accountable for a wide range of economic crimes is developing significant traction.

If introduced, it would see companies registered or operating in the UK exposed to criminal prosecution if they did not have adequate procedures in place to safeguard against economic crime.[3] Potentially, companies of all sizes with operations in the UK would be affected. The practical effect is that they would be required to carefully implement tailored procedures to combat fraud, money laundering and a whole range of other economic crimes. In a recent example prosecuted under the Money Laundering equivalent offence, Natwest was fined a record £**265**m by the UK's financial watchdog for failing to prevent nearly £400m of money laundering through its branches.

An offence of this breadth would mark a radical expansion of corporate criminal liability. Subject only to a handful of exceptions, for a company to currently be exposed to criminal liability in the UK those identified at the very top must themselves engage in the wrongdoing. The so-called "identification doctrine" can be difficult for a prosecuting authority to satisfy in practice, particularly where the company is large or decision-making may be layered. Sir David Green QC, the former Director of the Serious Fraud Office (SFO), once commented in relation to the evidential hurdles posed by the identification doctrine that "the email trail has a strange habit of drying up at the middle management level."[7] In turn, this can make targeting smaller companies more attractive to prosecutors even though the larger companies may reap far more from wrongdoing and their conviction would send a far greater deterrent message. For some time, there have been calls for reform and for more to be done to tackle fraud and other forms of economic crime that happen on a company's watch or from which they benefit.

In recent months, the likelihood of the proposal coming to fruition has increased despite taking what can best be described as a meandering path towards

the statute books. Announced by David Cameron in 2016 at the London Corruption Summit,[8] support for the proposal has ebbed and flowed. It is now more firmly in view. The new offence featured in the the government's Economic Crime Plan 2019 – 2022[9] and in the last 12 months, it has received a jolt. The Director of the SFO, Lisa Osofsky, has consolidated the authority's support for it, describing it as being at the very top of its "wish list"[10]. Last summer the Law Commission also commenced an arguably long overdue consultation on the reform of corporate criminal liability. One of the key issues for discussion is whether the UK should broaden the corporate failure to prevent model which already applies to bribery and tax evasion facilitation.[11]

The proposal would be a broadening rather than something altogether new because the first offence of this kind was introduced over a decade ago when the Bribery Act 2010 was passed. Section 7 of the Bribery Act 2010 establishes that a commercial organisation, including a partnership, will be guilty of a criminal offence of failing to prevent bribery where a person "associated" with it engages in bribery intending to benefit that organisation. The single defence is if the organisation had in place "adequate procedures" designed to prevent such conduct. There is also a striking extraterritorial aspect. Any company or partnership incorporated or formed in the UK or which carries on business in the UK is captured. Further, it is irrelevant where the conduct amounting to bribery occurred or if anyone at the company even knew about it. As for definitions, an "associated" person will capture far more than an employee. It is drafted widely to include agents, subsidiaries and any person at all who performs services for or on behalf of the organisation.

The corporate offence of failing to prevent tax evasion facilitation, which appears in sections 45 and 46 of the Criminal Finances Act 2017, is based on identical concepts. Additionally, just like its bribery equivalent, a company that is incorporated or does business in the UK can be exposed to criminal liability and face an unlimited fine, even if the criminal conduct carried out by the "associated" person never resulted in a criminal prosecution.

Overall, the failure to prevent model has the potential to ensnare a company of any size but in practice there are very few prosecutions. Only one company so far has been prosecuted under the failure to prevent bribery provision. Skansen, which was convicted by a jury in 2018, was a small interiors business which by the time of the trial had ceased trading. None have yet been prosecuted under the equivalent tax provision but it was reported in late 2020 there were 13 live investigations.[12]

All this is not to say that the model is toothless. The value of offences of this kind instead lies in their deterrent effect and ability to catalyse cultural change in companies both big and small. Centring the offence around "adequate" or "reasonable" procedures compels a company to put in place tailored safeguards that are proportionate to the size and nature of their business. Use of a 'boilerplate' policy is unlikely to suffice. Guidance has been published by the government on what adequate procedures should entail. The emphasis is on implementing effective policies, controls and procedures that involve careful risk assessment mitigation, monitoring, compliance and training. What will be considered adequate will be different for every business.

The failure to prevent model holds a further attraction for prosecuting authorities. A failure to have proper procedures in place can lead to Deferred Prosecution Agreements ("DPAs"). Since 2016 DPAs negotiated by the SFO and approved by the Courts, have contributed over £1 billion to the public purse[13] and resulted in significant profits for the taxpayer. Although the prosecution tally of trials for related offences may currently be dismal, the consequences of failing to prevent can be costly for business.

Any future failure to prevent economic crime offence can be expected to contain the same key features of the bribery and tax evasion facilitation provisions. Inevitably, it will lead to more DPAs. For the SFO, which has recently been criticised for its prosecution record, a new offence of this kind would provide a significant boost. Aside from more DPAs standing to further benefit the public purse, it would clear the "identification doctrine" from the path of prosecutors and enable investigations to commence against companies in relation to a full range of economic crimes.

Furthermore the proposed new offence is a broad one with the capacity to hold companies accountable for not just high-profile frauds, but any other conduct that would fall into the definition of economic crime. Money laundering, bribery and corruption, market abuse, false accounting and breach of financial sanctions would all arguably fit the bill.

Where the line would be drawn remains to be seen. There are a host of other offences that can also lead to economic benefit including some forms of cyber-crime and environmental crimes. Precisely what should be properly characterised as an "economic crime" is an open question at this point but there is a strong argument that the list should be kept short, mindful of the compliance burden that companies would face.

Tied to this, whether all companies in the UK should be exposed to such a broad offence or just those with significant turnover or that are regulated, are matters that will need to be traversed in due course. An earlier iteration of the proposal appearing in the Financial Services Bill 2021 for example applied only to FCA-regulated companies. [14]

If the proposal does advance, the time that should be afforded to companies to develop and review their procedures and ensure they are fit for purpose will be a further crucial consideration. Given that "reasonable procedures" is the single defence, companies need to be afforded sufficient time to take advice and reflect on what needs to be improved.

There also looms a larger question about whether, if an offence of this breadth is introduced, the authorities will possess the resources needed to properly investigate companies in relation to such a range of economic crimes. Although prosecution of the "associated person" involved is not necessary, for a company to be exposed to criminal liability for failure to prevent, the authorities do first need good evidence that an economic crime has taken place. The authorities are proponents of the proposal at the moment but whether they actually have the means to take advantage of it is another matter.

These issues can be expected to be discussed in due course if the proposal continues to attract support. In anticipation, commercial organisations of all sizes would be wise to consider now the procedures they have in place already to combat not just bribery and tax evasion as currently required, but also money laundering and fraud. In this regard it will be important to consider –

• How the risk specifically affects your company including not just how the company can fall victim to fraud but be used as a conduit for criminal activity

• How is the risk to your company impacted by the activities it undertakes and places in which it operates

• Risk is not static and there will be need for continuing review

• Practical measures in place to mitigate risk

• Whether those that act on behalf of the company, not just employees, have an awareness of the measures put in place and have been suitably trained

Implementation of major changes is unlikely to be required at this juncture but it will be important to start considering the safeguards that are in place and, where possible, fostering a culture of awareness around economic crime risk. Expanded corporate liability is on the table and forewarned is forearmed.

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Privacy and Suspect Rights - UK Supreme Court Confirms an Individual's Right to Privacy When Under Criminal Investigation

Summary
In a recent judgment (*Bloomberg LP v ZXC [2022] UKSC 5)*, the UK Supreme Court confirmed that suspects subject to a criminal investigation are entitled, as a general rule, to a reasonable expectation of privacy regarding information relating to the investigation until they are charged. The ruling is consistent with established principles relating to suspect rights, similar decisions from lower courts and published police guidance.

Cases such as *Bloomberg v ZXC* are often highly fact-specific. The Supreme Court did not deal with situations where an individual's wrongdoing is publicised through a separate media investigation independent of police or regulatory processes. It also does not deal with circumstances where an individual is named as having participated in misconduct but is not charged in those proceedings.

Any publication of the fact that an individual is subject to a criminal investigation is inevitably damaging to the reputation of that individual and potentially to any organisation with whom they are associated. In light of this, it is fair for a suspect to expect that an organ of the state keeps *"suspicions, assessments, and preliminary conclusions to the disfavour of [the suspect]"* confidential. Once the authorities decide to bring charges against an individual, the principle of open justice prevails and the matter enters the public domain. The principle of open justice is motivated by the desire (among others) to ensure that courts and tribunals can be held accountable for the decisions that they make, and to maintain public confidence in the way that those decisions are made.

The delicate balance between maintaining the integrity of criminal processes, free press reporting of matters in the public interest and an individual's right to privacy is, and will continue to be, the subject of intense debate. A Bloomberg spokesperson stated that *"We are disappointed by the court's decision, which we believe prevents journalists from doing one of the most essential aspects of their job: putting the conduct of companies and individuals under appropriate scrutiny and protecting the public from possible misconduct"*.

The UK government has announced plans to overhaul the Human Rights Act 1998 and reformulate these principles into a UK Bill of Rights. It is possible that this new legislation will recast the current status quo changing the balance between press and suspect interests as clarified in this case.

In practice, an individual subject to ongoing criminal investigations should take some comfort from the decision that until they are charged, they have the right to privacy which can, if required, be enforced through the courts. Although pursuing an active media engagement strategy of rarely advisable in these circumstances, individuals under investigation should closely monitor media coverage of the investigation and be prepared to respond quickly if their privacy rights are threatened.

Background
In 2016, Bloomberg (the Appellant) published an article naming the Respondent (**"ZXC"**), a US citizen working as a chief executive of a regional division, together with his employer, a UK-listed company (**"X Ltd"**). X Ltd were being investigated by a UK Legal Enforcement Body ("UKLEB") for allegations of fraud, bribery and corruption. To aid with their investigations, UKLEB had sent a confidential letter to the authorities of a foreign state requesting information and documents pertaining to ZXC. This letter expressly requested that its existence and contents were to remain confidential. Bloomberg was able to obtain a copy of this letter and then publish an article in the autumn of 2016 primarily sourced from information found in the letter. Bloomberg reported that ZXC had been interviewed by the UKLEB and that information had been requested in respect of ZXC and also detailed the matters in respect of which he was being investigated.

The investigations remain ongoing, but the current position is that no employees of X Ltd have been charged with any offence.

After Bloomberg refused requests to remove the article from its website, and also following an unsuccessful interim injunction application, ZXC brought a successful claim against Bloomberg for misuse of private information where it was found by both the High Court and Court of Appeal that Bloomberg had breached ZXC's Article 8 rights under the European Convention on Human Rights (the right to respect for private and family life). ZXC contended that he has a reasonable expectation of privacy in relation to the fact that UKLEB was investigating him and that it had requested information relating to him in the context of its investigations. The Court had to balance ZXC's Article 8 rights against Bloomberg's rights under Article 10 (Freedom of expression).

The Judgment

The tort of misuse of private information determines liability with a two stage test. Firstly, one should consider whether the claimant objectively has a reasonable expectation of privacy over the relevant information considering the circumstances of the case. These circumstances include, but are not limited to, those identified in *Murray v. Express Newspapers* [2008] EWCA Civ 446. Those circumstances are likely to include what have become known as the *"Murray factors"*, which are:

(1) the attributes of the claimant;

(2) the nature of the activity in which the claimant was engaged;

(3) the place at which it was happening;

(4) the nature and purpose of the intrusion;

(5) the absence of consent and whether it was known or could be inferred;

(6) the effect on the claimant; and

(7) the circumstances in which and the purposes for which the information came into the hands of the publisher.

Stage two is to consider whether any reasonable expectation of privacy is outweighed by the publisher's right to freedom of expression under Article 10 whilst taking into account section 12 of the Human Rights Act 1998.

It should be uncontroversial and widely accepted that there is a substantial negative reputational effect on an innocent person when it is published that they are being investigated by the police or similar investigatory state body. It is the general practice therefore that state investigatory bodies will identify those under investigation only once they have been charged. Bloomberg's arguments challenging this were ultimately rejected by the Supreme Court.

It was recommended by the Leveson Report in 2012 that *"save in exceptional and clearly defined circumstances … the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public"*. This recommendation has since been adopted by state investigatory bodies. This was more recently confirmed in March 2021 when the Parliamentary Under-Secretary of State for Justice stated that *"The Government believe that, in principle and in general, there should be a right to anonymity pre-charge in respect of all offences"*.

The Supreme Court panel of five Justices unanimously dismissed Bloomberg's appeal. The judgment was handed down by Lord Hamblen and Lord Stephens, with which the other Justices agreed. The Supreme Court found against Bloomberg on 3 issues:

(1) that the lower courts were correct that as a starting point, an individual under criminal investigation, prior to charge, has a reasonable expectation of privacy in respect of information relating to the criminal investigation and that the facts of this case were such that there was an expectation of privacy;

(2) Bloomberg argued that the Court of Appeal was wrong to determine that, in a case in where a claim for breach of confidence was not pursued, the fact that information published by Bloomberg originated from a confidential document meant that the information was private and prevented Bloomberg from relying on the public interest in its revelation. The Supreme Court ruled that the Court of Appeal had not held that the fact that the information originated from a confidential document rendered the information private or meant that Bloomberg could not rely on the public interest in its disclosure. Confidentiality and privacy will often overlap, and if information is deemed to be confidential, it is likely to support the reasonableness of an expectation of privacy; and

(3) as Bloomberg was unsuccessful on the previous two points, the Supreme Court found that there was no grounds to intervene on the balancing between Article 8 and 10 rights which had been decided at the first instance.

The Supreme Court confirmed that the lower courts gave appropriate consideration to the applicable Murray factors in their analysis, including ZXC's status as a businessman as part of a large public company. ZXC's status might mean that the level of acceptable criticism is greater than that for a private individual; there is however a limit. The Court was clear that ZXC's status is not in itself determinative and should only form part of the stage one analysis. Prominent individuals are still entitled to privacy.

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The Police Ombudsman for Northern Ireland Report into the Police Handling of Loyalist Murders in Belfast 1990-1998: A Lesson for Contemporary Policing in the Use of Informants

by Dr David Lowe

Introduction

This article examines the issue of collusion by counter-terrorism police officers, allowing the informants they handle to commit offences. This concern is brought about by the amendment to the Regulation of Investigatory Powers Act 2000 (RIPA) by the Covert Human Intelligence Sourced (Criminal Conduct) Act 2021 that permits in specific circumstances informants to be involved in criminal conduct. As a result, the article looks at examples of collusion by the former Royal Ulster Constabulary (RUC) officers during the 1968-1998 Irish Troubles to assess what lessons can be learnt by counter-terrorism officers today. The focus emanated from the Police Ombudsman for Northern Ireland Review into loyalist murders committed between 1990-1998 released in February 2022, and the reports and cases related to the murder of Irish solicitor Pat Finucane in 1989. While this may seem to be an examination of events that took place many years ago, they are still events subject to ongoing legal proceedings.

Police Ombudsman for Northern Ireland Review

On the 8th February 2022 the Police Ombudsman for Northern Ireland, Marie Anderson's review into the police handling of loyalist murders in South Belfast between 1990-1998 was published. The height of the murders caried out by the loyalist paramilitary group the Ulster Defence Association (UDA) under the pseudonym of the Ulster Freedom Fighters (UFF) was between 1990-1994, where 56 were murdered in the whole of Belfast. During the Irish Troubles the UDA were not proscribed as a terrorist organisation until August 1992, with the UFF having been proscribed since November 1973, where UFF terrorist activity was simply a cover for the UDA's activities. In the review the police referred to is the RUC that following the 1998 Good Friday Agreement was renamed the Police Service of Northern Ireland (PSNI). Five principal elements of the review's investigation were:

1. The RUC's response to intelligence, where it was available, that victims may have been under threat prior to their murders;

2. The RUC's knowledge of the origins and history of firearms that were used in the attacks;

3. The recruitment and management of informers by the RUC in Belfast;

4. The handling and exploitation of intelligence by the RUC; and

5. The conduct of the related RUC investigation into the murders.

The review also considered the allegations made by the victims' families that includes:
1. That the attacks were preventable;

2. The related RUC investigations were ineffective; and

3. The RUC colluded with loyalist paramilitaries, including informants, during the period 1990-1998

While this review may be seen as an investigation into events that occurred between 24 to 32 years ago in Northern Ireland, an important issue the review examined was collusion between the RUC's Special Branch officers and the loyalist informants they handled. With the UK government having introduced the Covert Human Intelligence Source (Criminal Conduct) Act 2021 that in specific circumstances is an authorisation allowing informants to commit criminal conduct, I raised a concern related to the Act regarding clear limits as to how far informants working undercover in terrorist groups could be allowed to go in relation to what offences in their criminal conduct is permissible under the Act[1].

Relevant to contemporary policing, after analysing a number of definitions of collusion, Anderson applied a broad definition where collusion is a wilful act or omission that can be active or passive, with active collusion involving deliberate acts and decisions. Passive or tacit collusion involves turning a blind eye or letting things happen without interference. As Anderson states, by its nature collusion involves an improper motive and, if proved, can constitute criminality or improper conduct and that corrupt behaviour may constitute collusion. It is accepted that the recruitment and handling of informants has changed considerably since the period the review investigated, primarily through statutory governance under sections 29–29D RIPA, with section 29B having been added through the Covert Human Intelligence Source (Criminal Conduct) Act 2021, with the accompanying Codes of Practice to guide the police through their statutory obligations. In the period the review covers the recruitment and handling of informants was governed by Home Office Circular 35/1986, which was simply a policy to guide the police. It allowed the police to use informants provided:
1. Neither the informant or the police counsel, procure or incite the commission of a crime;

2. The informant's role is minor; and

3. Their involvement is designed to frustrate the crime and arrest principals.

The condition that an informant is not involved in the commission of criminal conduct contained in the Home Office Circular was transposed into the original version of RIPA where under section 27 there was an obligation on the police ensuring the informant does not get involved in carrying out any form of criminal conduct and if they did then they would be arrested and potentially charged with offences related to the conduct they were involved in.

In January 1987 the RUC corresponded the Northern Ireland Office, raising concerns that following the 1986 Home Office Circular would fetter their ability to police both the republican and loyalist paramilitaries, saying: *'The [Home Office] Guidelines take no cognizance at all of the special problems relating to Northern Ireland. They were, of course, drawn up to deal with 'ordinary' criminals in a mainland context, rather than for coping with terrorists. Given our special situation the restrictions placed upon us by virtue of the guidelines are unrealistic if we are to continue paramilitary penetration/ [informant]protection.'*

The RUC make a valid point as at that time both republican and loyalist terrorist groups were very active, with republican groups conducting terrorist activity in both Northern Ireland and England. Using informants to gain intelligence on the groups' activities they would be committing offences, mainly membership of terrorist organisations (section 2 Prevention of Terrorism (Temporary Provisions) Act 1989 – now repealed) and, at that time, conspiracy to commit criminal offences (section 9 Criminal attempts and Conspiracy (Northern Ireland) Order 1983). This situation has not changed today. Informants infiltrating terrorist groups are likely to commit the offence of membership of a terrorist organisation (section 11 Terrorism Act 2000) and in order to gain intelligence of proposed activity of the group, the offence of planning and preparing an act of terrorism (section 5 Terrorism Act 2006). Unfortunately, as Anderson's review revealed, as the Home Office Circular guidelines had been discarded some of the RUC's Special Branch officers colluded with UDA/UFF members who carried out murders, particularly during the 1990-1994 period.

In her review, Anderson acknowledges that during the troubles the RUC's use of informants resulted in the conviction of individuals involved in acts of terrorism, with firearms and other items of use to the paramilitaries removed and lives saved. The review states that risk assessments of informants must be:
1. Frequent;

2. Individually tailored to specific circumstances;

3. Fully documented in order to ensure a robust and transparent process; and

4. The quality and frequency of information supplied must be regularly reviewed.

Unfortunately, some RUC Special Branch officers did not carry this out as revealed in the investigation into murders committed by loyalists, leading Anderson to say: *'The pressure to create and maintain an extensive intelligence network within paramilitary ranks led to an environment where police, at times, failed to ensure the effective and efficient management of informants. The quality and*

quantity of intelligence obtained was disproportionate when balanced against the significant threat posed to those parties involved and wider society. In these instances, I am of the view that the risks taken by police were unacceptable.'

Sean Graham Bookmakers Attack

A good example of this contained in the review is the attack on the Sean Graham Bookmakers in the Ormeau Road on the 5th February 1992, where two UFF gunmen entered the premises and shot four men and a 15 year-old boy. Following the attack an anonymous caller using a recognised codeword contacted the BBC saying: *'This afternoon UFF volunteers carried out an operation on members of the most active unit of PIRA which is based in the Lower Ormeau/Markets area. This area has become a cesspit of Republicanism and as such the UFF targeted Sean Grahams. The UFF are confident that at least two well-known players have been executed. Remember Teebane.'*

This attack was a tit-for-tat attack by the UFF for Teebane attack carried by the Provisional IRA (PIRA) in January 1992 where they detonated a roadside bomb destroying a van carrying 14 construction workers who had been repairing a British Army base in Omagh, killing 8, injuring 6, all protestants. PIRA claimed responsibility saying the workers were collaborating with the 'forces of occupation'. In June 1992 RUC's Special Branch officers received information indicating a person to be one of the gunmen, but this was not disseminated to the senior investigating officer investigating the Ormeau Road murders. This is where the Ombudsman found potential collusion. As a result, the families wish to take further legal action that the RUC failed to discharge their duty under article 2 European Convention on Human Rights (ECHR), the right to life and this is preventing the families request to have an article 2 ECHR compliant review.

Pat Finucane Murder

Linked to other murders committed during the Irish Troubles where it is alleged that RUC Special Branch officers acted in collusion with the UDA/UFF is the murder of the lawyer Pat Finucane in February 1989 by loyalist paramilitaries from the UFF who shot him 14 times in front of his wife and three children while having supper. Since the murder, Finucane's family have been requesting an article 2 ECHR compliant review, a legal issue that is still ongoing. In 2011 Sir Desmond de Silva QC was appointed by former Prime Minister, David Cameron, to head a Review into the collusion by MI5 and the RUC into Finucane's murder as through their handling of loyalist informers they were seen as complicit in the murder. The Finucane family described the report as a 'sham' because they had no input and it blamed dead witnesses and defunct military organisations. The UK's Supreme Court recognised De Silva's Review was not an effective article 2 ECHR compliant review as the Review does provide pertinent evidence related to the murder. The main issue is allegations that RUC officers encouraged the UDA/UFF to murder Pat Finucane. Finucane was a criminal lawyer who regularly represented PIRA members that included representing them during their police detention and subsequently in court proceedings, as a result, evidence was produced that Finucane received death threats from certain RUC officers. (It is worth noting that Finucane also represented loyalist paramilitaries suspected of terrorist activity.) In 2004 UDA member, Kenneth Barrett was convicted of Finucane's murder.

While RUC officers made no direct threat to his life to Finucane, the allegations of the threats RUC officers made towards him came via Finucane's clients who had been arrested for terrorism offences that he was representing. In his Review, de Silva felt there was a degree of unreliability regarding the allegations over Finucane's safety as they were uncorroborated. Also, as they were made my PIRA members, who being part of an organisation that would readily distort the truth to support their broader objective, he claimed these men: *'…would not have hesitated to either invent or exaggerate allegations against the police if they felt by doing so, they would discredit the RUC as an organisation.'*

However, the day after Finucane was murdered the Irish Ambassador met the Secretary of State for Northern Ireland where, based on information the Irish government had received, he raised concerns the RUC were encouraging loyalist paramilitaries to attack republican lawyers, including Finucane. This claim was supported by loyalist paramilitaries who claimed two RUC detectives were complicit in Finucane's murder by encouraging loyalists to carry it out. This included Barrett, who claimed that some RUC officers were 'putting the word out' to loyalist paramilitaries that Finucane 'should be hit'.

In 2019 in a judicial review of the murder (In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC7), the UK's Supreme Court was asked to consider whether an article 2 ECHR compliant review be held. The first issue the Court considered was with the murder taking place in 1989 and the UK introducing the Human Rights Act in 2000 (where the Act incorporated the ECHR into UK law), could the Act's provisions apply. In Brecknell v UK (2007) 46 EHRR 42 the European Court of Human Rights (ECtHR) heard a similar application with similar facts, where a widow claimed her husband was killed by a UDA gunman in 1975 following collusion with RUC officers. The Court held that it could be heard due to new evidence coming forward after 2000. In relation to Finucane, in his 2003 enquiry, the former Commissioner of the Metropolitan Police, Sir John Stevens concluded he had uncovered 'enough evidence' that the murder could have been prevented and the investigation into the murder should have resulted in the early arrest and detection of the killers. He also concluded there was evidence of collusion in the murder between RUC officers and loyalist paramilitaries with that collusion taking the form of:

1. 'wilful' failure to keep records;
2. absence of accountability;
3. withholding intelligence and evidence; and
4. extreme [informer] being involved in the murder.

As this enquiry claiming there was new evidence was published in 2003, the Supreme Court stated they could hear the case. The Court also held that from de Silva's Review conclusions that one or more RUC officers 'probably' did propose Finucane as a target for loyalist terrorists, it, '…bears directly on the proper investigation of his murder'. As such, the Court held as the police source escaped any sanction and not been held accountable, the murder has avoided all the legal consequences that should have followed from that officer's activity. This resulted in the finding in Lord Kerr's judgement who held there has not been an article 2 ECHR compliant inquiry into Finucane's death, adding it is for the state to decide if a public inquiry should follow the Court's decision. Lord Kerr added: '…in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of article 2, what form of investigation, if indeed any is feasible, is required in order to meet that requirement.'

In November 2020 the UK government decided a public inquiry into the murder would not take place. Brandon Lewis, the Secretary of State for Northern Ireland, as he saw as important the ongoing Police Service of Northern Ireland (PSNI) and the Police Ombudsman processes and they should be allowed to move forward, but he did say the possibility of a public inquiry was 'not off the table'. Clearly, this is a political decision, not one based in law and Lewis' decision was seen as making a mockery of the Supreme Court's decision. As a result of this decision, in March 2021, Europe's leading human rights body, the Council of Europe (from which the ECHR and the ECtHR emanates) announced it will re-open its supervision of the Finucane case. Driven by the Republic of Ireland government, there is no doubt there is a likelihood of the UK government having to meet its obligations under article 2 and have a compliant review. This is due to the Council of Europe stating it will supervise the ongoing measures to ensure they are adequate, sufficient and proceed in a timely manner, requiring the PSNI and the Ombudsman reviews proceed promptly in line with ECHR standards. No doubt the Council will refer to the earlier case of Finucane v UK (2003) (Application 29178/95) where the ECtHR held unanimously there was a violation of article 2 as the proceedings for investigating Finucane's death failed to provide a prompt and effective investigation into the allegations of collusion. As the Police Ombudsman process is now completed, the Secretary of State for Northern Ireland should consider revising his decision as it is surely now 'back on the table'.

Conclusion

It is acknowledged that the incidents and cases from the Irish Troubles referred to in this article occurred during a time an extremely violent conflict that has also been referred to by loyalists as the 'long war'. During this conflict there were periods where attacks carried out by dissident republican and loyalist groups was virtually on a weekly basis, which put unparalleled pressure on the RUC to not only investigate the attacks, but to also prevent further attacks. In addition to this, during this conflict dissident republican groups like PIRA targeted RUC officers, killing 300 officers. Even though the current terrorist threat level is at severe in Britain (mainly from Islamist and Extreme Far-Right groups) and severe in Northern Ireland (mainly from dissident republican group activity) the frequency of attacks is nowhere near the intensity seen during the Troubles. It is also acknowledged that the statutory governance of informants under RIPA ensures a much tighter control in the recruitment and handling of informants compared to the 1986 Home Office Circular. These are key points raised in the reports, cases and the Police Ombudsman for Northern Ireland review. Returning to the Covert Human Intelligence Source (Criminal Conduct) Act 2021 that introduced section 29B RIPA, the question remains, what allowance will informants have in relation to their involvement in criminal conduct? Should the intensity of plots to commit and the actual commission of terrorist attacks increase, the lesson for contemporary counter-terrorism policing who are tempted to deal with terrorist activity similar to the situation some RUC Special Branch officers carried out by colluding with terrorists to get results and hide behind section 29B RIPA, even if it is under the misguided altruistic view of such action being taken to serve a greater good, should be avoided.

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Dr David Lowe is a retired police officer and is currently a senior research fellow at Leeds Law School, Leeds Beckett University researching terrorism & security, policing and criminal law. He has many publications in this area including his recent books 'Prevent Strategy: Helping the Vulnerable being drawn towards Terrorism or Another Layer of State Surveillance?', 'Terrorism and State Surveillance of Communications' and 'Terrorism: Law and Policy', all published by Routledge. Routledge will be publishing the 2nd edition of his book 'Terrorism Law & Policy: A Comparative Study' in May 2022. David is regularly requested to provide expert commentary to UK national and international mainstream media on issues related to his research areas and he provides an expert witness service.

What are the Risks and Rewards of Investing in Cryptocurrency?

by Louise Bennett, Dispute Resolution Fraud & Financial Crime

Investments in cryptocurrency are becoming increasingly popular. Many such investments have been doing extremely well lately, with Bitcoin leading the way. The cryptocurrency market is at the cutting edge of financial technology and has created a real buzz, which is attracting both amateur and professional investors to spend billions of pounds each year. However, crypto investment can come with huge risks, which all investors should be aware of before looking to purchase cryptocurrencies.

In this article, Louise Bennett, a litigation solicitor who specialises in cryptocurrency at Keystone Law, provides an expert insight into both the rewards and risks associated with crypto investments.

A crucial starting point for all speculative investors is to be aware that unlike legal tender issued in England, cryptocurrencies are not backed by any government authority. This means the consumers cannot (at the present time) access any FCA compensation scheme for cryptocurrency losses due to fraud. Investors, therefore, need to be thorough with their due diligence as it is their responsibility to check the nature of all investments.

This is even more so in the current climate – fraud is on the rise, especially within the financial and banking sector, and cryptocurrency investments are ripe hunting ground for fraudsters who are making the most of its growing popularity and unregulated status.

Investors need to ensure they properly understand the investment they are making and carry out the appropriate due diligence on the scheme/end investment. The risk is entirely on the investors, with no formal protection in place if they take the wrong gamble. There has been a significant rise in crypto scams, with many wallets held on the blockchain being fed into scam companies, and the wallets emptied and stolen.

Financial institutions must maintain certain protection activities against money laundering and fraud, the transmission of funds, and more. New types of wallets are being released all the time, and while cryptocurrency exchanges are always improving their security measures, investors have so far not been able to fully eliminate the legal risks associated with owning cryptocurrencies, and it is likely that they never will.

Organisations are becoming more sophisticated with the services they can offer crypto holders. Digital assets are becoming increasingly popular amongst businesses, as well as individual investors, with many businesses now accepting collateral in the form of cryptocurrencies. The modern business world leans heavily on the success of the cryptocurrencies.

Will borrowers soon demand these types of service from their banks? The potential implications of cryptocurrencies are massive. The banking industry was historically resistant, in large part, to this technical disruption. However, that is beginning to change due to the development of blockchain technology.

As we are moving towards a world when we can buy products using cryptocurrency, this means that crypto holders may start using their crypto wallets on a blockchain platform to buy products, raise loans, use faster payments, etc., so it is more akin to a bank account. If anything, though, having this multifaceted platform in which to conduct a range of matters, only amplifies the need to protect investments.

The reality is that cryptocurrency is here to stay, and it is hugely successful. Banks need to prepare for a more permanent change towards this type of investment. However, given the risks involved, and the importance of our banking services for the economy, it is a move not to be taken lightly.

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Marine Cyber Risk - A Primer for Landlubbing Lawyers

by Tom Evans, London - Walbrook

After a flurry of regulatory and governance activity in 2017[1], market attention towards marine cyber risks had gone comparatively quiet until 2021 when a re-energised focus emerged following the implementation of International Maritime Organisation (IMO) Resolution MSC.428(98). In essence, the resolution encourages administrations to ensure that cyber risks are appropriately addressed in existing safety management systems no later than the first annual verification of the company's Document of Compliance after 1 January 2021[2].

Being advisory in nature, the resolution did not fundamentally alter the regulatory environment of marine cyber risk management. It did, however, provide a useful practical framework upon which insurers could build up a platform of best practice for the mitigation of cyber risk, forming as it did so a foundational element for some marine cyber policies.

Regarding the nature of that risk, a valid question to ask is, what makes marine cyber special? The widespread use of ransomware by threat actors is largely agnostic of industry sectors, so why is there a need not only for specialised cyber insurance, but for cyber insurance relating only to the marine sector? The answer lies in two parts: (i) the fact that marine sector activity is broadly split between very different legal, regulatory, and physical environments ashore and afloat; and (ii) the differences between vulnerabilities in ships relating to information technology (IT) and to operational technology (OT).

On the first issue, a number of insurers offer what is essentially a rebranded version of their standard cyber cover for ashore operations. This means that all of the basic business administration needs of the shipping industry can be covered in much the same way as any other commercial concern. Cover often includes 'cradle to grave' breach response services, with the inherently international nature of the marine sector accounted for in these provisions. In a sector in which numerous business administration nodes are likely to be located in different jurisdictions, but share a network vulnerability, such considerations are crucial. Afloat cyber cover is often linked to, or offered as an extension to pre-existing hull products and loss of hire policies.

Regarding the second point above, it is important to understand the differences between IT and OT, but also to appreciate their increasing interconnectedness. In basic terms, IT cover generally relates to data loss and business systems interruption; conversely, OT cover deals with potential physical damage caused by interruption to operational functions such as steering gear, propulsion, or instrumentation. Advances in technology mean that OT is increasingly networked, both between component systems, and with external networks. This is particularly the case with regard to system diagnostics and fault rectification applications. Although these developments have given rise to significant advances in ship safety, they present a degree of risk in so far as any vulnerability to a network to which OT is connected may give rise to an associated vulnerability to that piece of OT.

If the potential vulnerability outlined is especially serious, it is at least conceptually possible that physical damage might occur. Whilst the most extreme examples remain unlikely, such vulnerabilities to OT may very well mean a loss of redundancy to system-monitoring for example, which could place a strain on lean-crewed ships which, in turn, could give rise to greater vulnerability of physical damage. This is where an aggregation of marine insurance products becomes important. Whilst the cyber aspect of cover will relate principally to IT afloat, an IT vulnerability may increase an OT risk, and an OT risk may increase the potential for individual error, for example, or situational mismanagement, creating the risk of physical damage. In destructive maritime incidents, it is rarely, if ever, one single issue that causes a collision, fire, or flood[3]; however, it is entirely plausible that a cyber-incident could form a constituent part of the causal chain leading to physical damage, particularly where OT is adversely effected.

The scope for legal support in this growing market is clear, creating as it does a complex and interrelated array of potential areas of dispute. Breach response counsel in this sector will be in as much demand as elsewhere, with the possibility for greater international and inter-organisational integration of legal advice across multiple jurisdictions and regulatory frameworks.

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DAC Beachcroft is pleased to welcome cyber-specialist barrister, Tom Evans, who joins Marine, Energy and Transport Insurance Partner, Toby Vallance, in developing its marine cyber offering. Tom joins from the Royal Navy, in which he has held high profile maritime cyber advisory roles in NATO, the Ministry of Defence and the US Department of Defense in the Pentagon. Bringing a wealth of experience in the areas of cyber breach, AI, autonomy and maritime legal and regulatory compliance, Tom adds unique expertise to Toby's well-established marine insurance team. Both Toby and Tom welcome enquiries on all aspects of marine cyber incident response and advisory work using the contact details above.

Defending Tax Professional Negligence Claims – What Insurers and Instructing Lawyers Need to Know and How the Tax Expert Witness can Assist

by Fiona Hotston Moore FCA CTA MAE, forensic accounting partner at FRP Advisory

Recent years have brought a number of professional negligence claims against accountants relating to apparently legitimate tax schemes that have subsequently fallen foul of HMRC.

The claims – relating to tax structures including film schemes and "disguised remuneration" schemes – have in many cases arisen from HMRC subsequently investigating and the courts finding against an accountancy firm's clients. In other instances, clients have proactively referred themselves to the tax authority having investigated and developed their own concerns about a scheme's structure, or have uncovered potential issues with schemes they participated at the point they are selling their business.

In my experience, liability can arise because many accountants and their clients failed to understand how aggressive these historic schemes were. Furthermore, in many cases the tax landscape and case law changed over a matter of a few years. Schemes that might have been capable of working when originally designed may have fallen foul of legislative changes or case law. On occasions the scheme failed due to errors in implementation.

Disguised remuneration schemes, for example, saw people paid in loans to avoid paying tax and National Insurance. However, the schemes were shut down in 2019 and HMRC gave taxpayers a limited window to settle substantial tax bills to avoid punitive penalties.

We've also seen multiple claims against the same firm of accountants in relation to a particular scheme that has been promoted to a number of clients. Claims may arise after accountants stepped outside their day-to-day expertise to offer schemes to clients that weren't in their skill set or suitable to the client's risk appetite.

In many cases, the promoters operating such schemes subsequently disappeared into the ether, leaving only the accountants who acted as an introducer to

face repercussions. They now face claims on their professional indemnity insurance policies.

Whatever the circumstances leading up to the complaint, this has a direct implication for a defending accountant's insurers, who could see a potentially sizeable claim on a policy and the accountant who may face reputational damage, disciplinary action from their professional body and a liability for the uninsured excess.

With claims usually settled out of court through mediation, thoughtful, thorough assessment of a client's liability to determine whether they acted as a 'reasonably competent professional' will help insurers assess policyholders' culpability, and ultimately any appropriate settlement.

In this process, there will be a few key steps to keep in mind.

A forensic investigation of tax legislation, relevant case law and the conduct of the accountant
The first step of any liability assessment must be to determine what the tax scheme itself was intended to do.

Insurers and their legal counsel will need to know how the scheme was envisioned and designed to operate at its point of execution.

This must be irrespective of how legislation or HMRC guidance subsequently changed or developed – negligence cannot be upheld if it was feasible that the scheme would have been legally permissible at the time an accountant was brought onboard. It will also be critical to examine whether the scheme was subsequently implemented as envisioned by the accountant or promoter, and whether pertinent tax counsel was sought and heeded.

The next stage should include a review of the marketing material for the scheme, the accountant's interpretation of it and how much, or little, the accountant was involved in promoting it to the client.

In some cases, it will be that accountants merely made introductions to scheme promoters and may have given appropriate warnings to their clients at the time about potential risks down the line.

If firms were actively involved in a scheme's execution or promotion, a defence should examine factors such as whether they understood and accounted for their client's risk appetite; how or whether they outlined the potential for legislation, case law and HMRC's own guidance on the scheme to change and whether they considered any less aggressive tax-optimisation alternatives.

From here, insurers will need to consider how the claimant acted in any correspondence with HMRC, including whether any alternatives to paying claimed outstanding tax were explored, or whether payment was made immediately to the tax authority without any due consideration of mitigation.

And, importantly, it will be essential to determine the quantum of the loss. This will need to account for any tax bill itself. But claimants may also register a claim for the opportunity cost against an accountant – the potential profit lost when capital that could otherwise have been channelled into the business is now instead paid in tax.

All the answers?
The process of determining negligence can be highly complex. And this complexity can only be compounded by the historic nature of many of these tax schemes, and the need to identify and source experts with contemporaneous knowledge of how they were operated and implemented at the time to build a thorough defence.

At FRP we have extensive experience acting as expert in tax and audit professional negligence matters for both Defendant and Claimant.

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Court of Appeal Reversal Over Banks' Fraud Prevention Duties

In a decision which will be welcomed by victims of financial fraud, the Court of Appeal (Sir Julian Flaux C, Coulson and Birss LJJ) has rejected the submissions of Barclays Bank that it owes its retail customers no general duty to take steps to prevent fraud when executing payment instructions.

The appellant Mrs Philipp had as part of an "authorised push payment" scam been persuaded by a fraudster to instruct Barclays to make a transfer of funds to accounts under the fraudster's control. Mrs Philipp alleged that Barclays should have realised that the transfers looked suspicious and done more to investigate. Barclays had obtained summary judgment on the basis that it had no such duty.

The bank sought on the appeal to defend the reasoning of HHJ Russen QC at first instance that the so-called "Quincecare" duty (after Barclays Bank v Quincecare [1992] 4 All ER 363) was confined to protecting against the risk to a corporate customer of a fraud by its own directors or agents. Barclays argued that no comparable duty was owed to individual customers who give their instructions to the bank directly.

The Court of Appeal, however, held that the underlying rationale for the Quincecare duty was not so narrow. Rather, the bank's duty to act upon its customer's payment instruction operates in tension with a duty to refrain from paying funds away if there are reasonable grounds to believe that the instruction is an attempt to misappropriate those funds. Nothing in the Quincecare line of reasoning depends on the payment instruction having been given by an agent. The duty of care could in principle arise whenever circumstances known to the bank put it on inquiry as to a potential fraud. The bank would then be required to make inquiries and to refrain from acting on a payment instruction in the meantime.

The Court of Appeal has not ruled definitively on the point of law since it was deciding an appeal against summary judgment and it was sufficient that the appellants' position was merely arguable. Indeed, it was emphasised that both the incidence of the duty and the standard of care are best decided on the basis of actual facts rather than a summary procedure. Nevertheless, the Court of Appeal's analysis as to the scope and rationale of the Quincecare duty is compelling and was supported by the Consumers' Association who intervened in the appeal.

Although Barclays had sought to argue that the imposition of a duty would be "onerous and unworkable" this involved a factual inquiry which was inherently unsuitable for summary disposal. The Court noted the appellants' expert evidence of banking practice in relation to fraud prevention and its overlap with anti-money laundering measures. The Consumers' Association on their intervention had also pointed to the training and guidance provided by banks and to decisions of the Financial Ombudsman which had upheld complaints against banks for having unreasonably failed to protect customers' money. Moreover, the Court of Appeal was careful to emphasise that the standard of conduct to which Barclays would be held was that of an ordinary prudent banker. It is not easy to complain that a legal duty is unduly onerous when the duty is itself calibrated by reference to normal industry practice.

Whether Barclays did fall short of the applicable standard remains to be decided but the facts are certainly striking. The appellant and her husband paid away more than £700,000 of their savings to accounts in the UAE after being "thoroughly deceived" by a fraudster into thinking that such transfers were necessary to protect the funds against fraud. Indeed, Birss LJ (who gave the lead judgment on the appeal) evidently felt that the "transfer of a huge sum of money out of [the appellant's] account to a payee overseas" was a far cry from a cashier's routine handling of a customer's cheques, in relation to which May LJ in Quincecare considered that it would only be in "rare circumstances" that a bank would raise a query.

Given the prevalence of authorised push payment scams, the Court of Appeal's judgment is important. Even if Barclays now chooses to settle with Mrs Philipp rather than defend her claims to trial, there will no doubt be other victims of similar scams who will wish to invoke the observation of Andrew Burrows QC, now Lord Burrows, as the first instance judge in Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm): "in the fight to combat fraud, banks with the relevant grounds for belief should not sit back and do nothing".

Author
Andrew Fulton QC
Twenty Essex
(who has acted in numerous APP cases).

Read the judgment here
www.bailii.org/ew/cases/EWCA/Civ/2022/318.html

Sailing Through Stormy Waters During Overseas Investigations

by Martin Chapman and Torie Hamilton Wilson of Azets

Recent economic and environmental events have highlighted the world's dependence on globalisation, and our reliance on each other. In recent years our interactions with people overseas have increased substantially, as it has become easier to communicate and conduct business with people in different countries. This is no different for criminals who see no borders or barriers to commit their crimes.

As I type 'corporate investigations' into google, it brings back multiple stories of corporate wrongdoing from around the world in any one day. Whilst some of these events may be confined to the country where the problem arose, more and more we are seeing cross border involvement and the need of forensic accountants and investigators.

The Why

Forensic investigations, by their very nature, are inherently complex and require specialist expertise. Now throw into the mix the added complexity of overseas assets and international waters, and the whole process can become far more difficult. Our reliance on international business and relations means that firms need to be equipped to conduct international and cross border investigations when things go wrong.

Forensic accounting experts are appointed to give their opinion based on their analysis of evidence and intelligence gathered. The key phrase here being 'their opinion'. Sometimes the facts themselves may appear confusing or unclear, however the experience and knowledge of an expert can be the defining factor in interpreting the substance behind the facts presented.

Taking complex matters and articulating them in an easy-to-read and understandable manner is a skillset in itself. Investigation experts have the ability to dissect the evidence and present findings in a defensible manner for any user, allowing them to make informed and educated decisions.

The How

Cross border investigations encounter a range of difficulties, particularly when dealing in jurisdictions whose laws and/or language is vastly different from that in your own country. These issues can be overcome by knowing where to look and what to look for, whilst also having a network of investigators on the ground to assist with complex matters.

The main source of information at the disposal of an investigator is open-source intelligence, that is, information available to the general public. Whilst navigating the internet may sound easy, the amount of fake news that is prevalent on online platforms today continues to be a concern for governments and technology companies, which can ultimately change an opinion for better or worse (we've all been down the YouTube rabbit hole!). The ability to remove yourself from the noise and filter only the relevant and accurate information relies on years of experience in various investigation techniques and skills.

For example, websites are often tailored to their jurisdictional presence, and will show different types of information or opinions depending on which country the user is streaming from. The use of virtual private networks to access region-locked information coupled with regional search engines (e.g. Baidu for China or Yandex for Russia) can help overcome this

and ensure that you are gathering information relevant to the jurisdiction under review.

Using a combination of online tools effectively enables an investigator to piece together the relevant evidence for the case.

Furthermore, investigations require finesse and using open-source information can leave a digital footprint, without you even knowing. The risks involved may depend on the case itself, and the ability to not leave a digital footprint can be pivotal in not alerting anyone of any ongoing investigations and this cannot and should not be underestimated.

Surveillance is another key means of investigating individuals and assets. This requires a network of resources globally familiar with each jurisdiction to locate and observe people's movements. Whilst it can be expensive, if used effectively it can be an incredibly useful resource and means of gathering information.
At Azets, we often team up with a network of expert investigators to assist on cross border reviews, depending on the case requirements. Mark Biggs, Chief Executive of Eminent Crisis Management Group Limited, is someone we have worked with on numerous occasions, and he has provided his top 3 tips for investigations:

1. Independence: Internal investigations should be completed by independent parties not connected to the business or individuals. This ensures a fair and open mind is maintained in regard to the investigation. All potential suspects or offenders would be considered and the risk of ruling out the 'it can't be them; they are too nice and worked here for years' is removed.

2. Planning: Take time to really plan your investigation strategy. A successful investigation really starts with thorough planning and the mapping out of your strategy. Looking at what you are seeking to achieve and routes you need to cover in order to prove it. Consider all possible defences in advance and conduct enquiries around these as soon as practical and be mindful of potential compromise while doing this.

Considering continuity is crucial and should play a major part in any investigation.

3. Interviews: Sit down with the team and form an interview plan. Interview teams should always consist of two people. One to ask the questions and two sets of ears that can analyse the answers and record crucial notes that can be referred to if needed. Following each interview, always ensure that full verbatim transcripts are completed by a trained transcriber. Proofread them and compare with your original notes from the interview.

The What
So, you've navigated your way through the international landscape and have collected all of the information you need to support your investigation, but how can you interpret and present it in an easily understandable manner? Often the overseas business structures are complex and may be in place to intentionally obfuscate matters or conceal information. Take a previously unknown overseas shareholding for example. Having found this, what does it actually equate to? What assets does the company hold? Who is entitled to what? What is the company actually worth? Without adding some substances to this information, the intelligence may be meaningless.

A forensic accountant's value comes from interpreting this information into bite-size digestible pieces that support an opinion or finding. Without this 'final' step in the investigation stage the benefit of the information gathered may be lost and worthless.

Whatever the output, our findings need to be supported by the facts. We prepare each and every report like it was being used for cross examination in Court proceedings to ensure a high-quality product.

Conclusion
When conducting international investigations, the needs and objectives of the client are at the heart of the work we do. It is important that the time and money spent investigating people or events is proportionate to the outcome. Whether the entity or individual being investigated has the assets to ultimately 'pay up' should be considered early on when developing your investigation plan. As professionals, it is important for us to consider these at the initial stage of our review.

The Forensic Accounting practice at Azets provides the following services:
- Investigations into crime
- Employee misconduct investigations
- Whistle-blower investigations
- Bribery & corruption cases
- Asset tracing
- Money laundering cases
- Forensic due diligence

Authored by Martin Chapman and Torie Hamilton Wilson of Azets.

About Martin Chapman

Martin is a Partner and leads the investigating services in the Forensic Accounting team at Azets. He has specialised in forensic accountancy since 2005. Martin is a Fellow of the Institute of Chartered Accountants in England and Wales.

Martin has been involved in a variety of forensic and investigation assignments including investigations into allegations of fraud and other financial irregularities, asset tracing, business interruption and loss of profit, commercial disputes, business valuations and transactions disputes.

Martin has routinely provided training to clients, solicitors, insurers and other legal professionals on accounting and investigation related matters in the UK. Martin is a qualified chartered accountant. Prior to becoming a forensic accountant he was involved in a range of assurance and advisory assignments, including external audit, compliance and internal controls reviews, internal audit and due diligence assignments.

About Torie Hamilton Wilson

Torie is a Forensic Accounting Manager at Azets, based in London. With over six years of experience, Torie has experience working on a range of engagements including international investigations, civil and criminal proceedings, international arbitration, insolvency, restructuring and corporate advisory mandates.

Torie is part of a highly experienced team at Azets who deliver forensic accounting and expert witness services in both civil and criminal cases as well as providing forensic advisory services. She manages the delivery of client's needs in relation to:

- Investigations into Fraud, bribery, corruption and employee misconduct
- Commercial, shareholder and matrimonial disputes
- International arbitration
- Loss of profits litigation
- Contentious and non-contentious business valuations
- Post company acquisition / sale disputes, expert determinations and breach of warranty claims

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Loss Adjuster Warn of a Number of Grey Areas and Challenges as Coverage of the Test Case Focused on Small Businesses

Differing instructions to adjusters on how to interpret wordings and quantum for almost identical BI claims from different insurers are producing very different outcomes for clients

The decision last year by the UK Financial Conduct Authority (FCA) to bring the Covid-19 business interruption test case has been widely applauded by the market, despite the challenge to insurers. This is not least because the ruling in January this year by the UK Supreme Court, which held that the majority of the wordings reviewed would respond in favour of the policyholder, brought much-needed clarity in an incredibly short timescale.

For example, shortly after the ruling, the London & International Insurance Brokers' Association (Liiba) pointed to the situation in the US, where commercial policyholders are looking at the prospect of years of litigation before they reach a similar position to the one the FCA has achieved in a matter of months.

For Liiba, the message from the Supreme Court to insurers in the UK could not be clearer: policies must be issued in such a way that clients know not only what risks are covered, but also know what risks are excluded.

The Supreme Court ruling has been equally welcomed by loss adjusters, which describe the judgment as robust and as sufficiently wide-ranging to enable the market to review and respond to most points. Indeed, the depth of analysis provided by the judges in the ruling and the appeal is regarded as extremely useful for adjusters and other specialists working in the field of insurance claims.

But adjusters also warn of grey areas and challenges ahead. To begin with, much of the coverage of the test case has focused on the impact on small businesses, but there are also a number of larger corporate policyholders whose insurance coverage will be affected by the decision. The ruling, adjusters warn, is also likely to trigger disputes between carriers and their reinsurers as a consequence of insurers having to increase their Covid-19-related business interruption loss estimates.

In addition, the Supreme Court only focused on the scope of the coverage of two common non-damage business interruption extensions to property insurance policies: for a notifiable disease causing illness within a specified radius of the insured premises; and the prevention of access to the insured premises by a competent authority (that is, the lockdown measures imposed by the government). And, while the court provided detailed comment on the coverage of the two policy extensions, it did not rule on how to calculate the quantum of the claims. According to the judges, each case needed to be considered on its own particular merits.

Policy checker

To put pressure on insurers to settle quickly, the FCA has launched an online policy checker application, which enables policyholders to compare their policy wordings to the 21 policies examined in the test case to see if their policy will cover business interruption losses due to Covid 19. In addition, the regulator has also launched a tracker showing how quickly insurers are responding to claims and what the outcome is.

While the depth of analysis provided by the judges is very helpful to loss adjusters, for the typical small to medium-sized enterprise (SME) policyholder, the highly technical appeal judgment, which runs to 112 pages, is very difficult reading. "Problems are more likely to arise from a lack of clarity on the part of policyholders, given the impression from some commentators all business interruption losses will be covered," Damian Glynn, director and head of financial risks at Sedgwick, says.

For example, specified disease cover will not respond, as Covid-19 did not exist at the time the lists were drafted. Disease at the premises cover will not respond to losses flowing from the government measures imposed on businesses as a result of the disease, as confirmed by the Financial Ombudsman Service for small businesses, which has the power to settle disputes between SMEs and providers of financial services, including insurers.

Against this background, the offer of a policy checker by the FCA is seen as a very helpful and easy way to encourage policyholders to get clarity regarding the details from their own specific policy wording. It may also help them to avoid jumping to assumptions based on newspaper headlines, according to Terri Adams, a director in the specialist adjusting practice at Charles Taylor Adjusting.

"It is clear the FCA is identifying ways to be very proactive and helpful for claimants, while still acknowledging many will be undoubtedly be disappointed on cover," Adams says.

Other adjusters, however, point out that, in their experience, the FCA coverage checker does not prevent a policyholder who receives a "no" from the FCA checker still sending in a claim to the insurer to have the answer validated which obviously adds to the sheer volume of claims that are being dealt with.

"An insurance policy is a contract between the insured and the insurer, therefore it is for the insurer to say there is no cover. Although they can delegate this responsibility to adjusters on instruction which they are doing in certain instances with these claims," Sue Taylor, director of Sue Taylor Ltd and co-author of The Basic Business Interruption Book published by the Chartered Institute of Loss Adjusters (Cila) and a contributor to Riley on Business Interruption, the latter being the standard text in the field.

The other aspect, according to Taylor, is the FCA checker is being used in many instances to check coverage in relation to insurers that were not party to the judgment and some insurers are raising this as an issue.

As things stand business interruption adjusters and forensic accountants are deeply involved in the resolution of quantum in these claims. Adams describes the volume of SME claims at present in the UK market as exceptional. However, she does not expect the situation to continue for an extended period as the FCA is pressing for rapid progress to settlement now the appeal is concluded.

The situation is a steep learning curve for the market, according to Glynn. "The pragmatism in dealing with large volumes of claims via automated portals, one of the major lessons from the pandemic, may well help in dealing with future surge events," he adds.

Quantum wars

Richard Cameron-Williams, a partner in the forensic accounting and valuation services practice at BDO, who has followed the test case closely, says the situation will lead to an outbreak of business interruption "quantum wars", the title of a series articles he has published over the past year about the implications of the FCA test case for the market.

The market, he says, now faces the considerable task of applying the framework set out by the judgments to the individual circumstances of many thousands of claims to calculate the quantum of each of each of the claims.

This process, he points out, is also likely shine a light on areas of the judgment that will require further clarification. At the moment, the two key areas where loss adjusters require further clarification are whether the Supreme Court judgment gives rise to the potential for multiple limits of loss occurrences or locations and the treatment of furlough.

However, the more immediate challenge for market, according to Cameron-Williams, is the fact that three months later there are still only draft declarations from the Supreme Court judgment, "so even now we are not in a position whereby what the judgment says is agreed by all parties. Until that is resolved, it's difficult to say whether there will be other areas that then require further clarification", he says.

However, the pressure on carriers to settle quickly represents a significant challenge for business interruption insurers, given the prevailing uncertainty, Taylor says. In any business interruption claim, when it comes to calculating quantum, there are always differing views. "You can have a loss adjuster and a forensic accountant appointed by and answering to the insurer," she says.

"In addition, there can be a claims consultant/assessor, frequently with a loss adjusting background, and forensic accountant appointed by, and answering to, the policyholder. They will, in most cases, come up with two very different answers in relation to quantum, based on the instructions they have received from their principals as to the interpretation of the information provided," Taylor adds.

A business interruption claim consists of two key questions: one, is the claim covered by the policy? And two, the calculation of quantum. There is no point moving on to the second part unless the answer to the first part is "yes", Taylor says.

"The first part of the claim is all about words and the second is all about figures. But the Supreme Court Justices considered the meaning of the words, in various wording forms, in order for the first question to be answered, but said in relation to the quantum, each case needed to be considered individually," she points out.

Different interpretations

The issue with words and figures, particularly given the complex nature of business interruption claims, is they can both be interpreted slightly differently, depending on how you look at them, Taylor argues. "And that is the issue for the market at the moment. In many instances adjusters, are being given differing instructions, from their various principals on how to interpret the words and the quantum, on what on the face of it, could be two almost identical claims from two different insurers, producing very different results. This inconsistency of approach from insurers is a major issue for the market."

What is clear is the FCA test case will radically transform the scope of coverage in the business interruption insurance market going forward, including the review of all existing insurer and broker wordings.

For Neil Baldwin, executive director at McLarens, the impact of the Supreme Court ruling will extend much further, particularly in a hardening market, with insurers changing their approach to rating and to the acceptance or otherwise of bespoke wordings or clauses.

With increased ratings, brokers and customers placing their business directly will need to consider their approach to insurance as their risk-transfer mechanism, Baldwin argues.

"We may see more self-insured retention arrangements through placement with captives or higher

deductibles, less covers written on an 'all-risks' basis, less attraction to bolt on additions to standard covers, and finally a growth in parametric covers for certain types of peril or risk," Baldwin says.

Parametric covers could prove to be particularly attractive to the market on notifiable disease exposures, given the fact less cover is being written at present as a direct consequence of the Covid-19 pandemic. "Insurers may lower the cover threshold for risks they are prepared to write directly, so co-insurance arrangements may feature more highly. Insurers may also want to exert greater control on bespoke wordings prepared by managing general agents and brokers," Baldwin says.

Loss adjusters and forensic accountants could also see their roles transformed in the future. "There will always be a role for loss adjusters and forensic accountants but, as we have seen over the last 30 years or so, the nature and scope of the roles will inevitably change. There may be more customers seeking direct relationships with loss adjusters to help them manage their self- insured retentions. And there will be an ever-increasing place for experienced professionals, including the increased use of technology by loss adjusters and forensic accountants, to manage new and emerging business interruption risk exposures," Baldwin adds.

Author
by Sue Taylor - Director, Sue Taylor Ltd

Facing Disciplinary Action – 2 – The Hearing

by Peter Crowley - Windsor Actuarial Consultants Ltd

Expert witnesses are used to giving evidence in court - however, a formal disciplinary hearing will differ substantially from being examined oneself (it is known as "hostile examination" - that won't make you feel better now, but "forewarned is forearmed…"

If you are facing such examination, you would be best advised to employ a defence barrister. You MAY think you can dispense with one, as you think you can do just as good a job yourself. If so, I would point out a recent article where a family barrister gets divorced herself, then decides to represent herself, and afterwards admits what a mess she made of it.

If your motive is to save money, I would ask you to compare the cost (which is often more modest than you might imagine) with damage to your professional reputation should you lose, not to mention the unnecessary stress you will encounter.

You are likely to be examined yourself – if so, remember and bear in mind the following:
a) Address your responses to questions to the Tribunal, or Investigating Panel, NOT to the barrister

b) Tell the truth. If you think you may have made mistake, say so. This represents professionalism, and will put you in good stead with any tribunal. No-one is perfect, and tribunals appreciate frankness, which also saves time. Barristers have a keen nose for sniffing out when someone is being less than candid, and you will face more questions, some embarrassing, if you withhold or try and misrepresent information.

c) Short answers are best. Do not over-elaborate – it gives hostile counsel (the barrister against you) more opportunities to trip you up.

d) Do not try and score points against any barrister. They are doing their job. Sarcastic or angry responses to their questions will damage your case.

e) Counsel's job is not to elicit the truth – which distinguishes them from most other professions – but to with their case. However, in doing this, they must not mislead the court. Accordingly, that barrister is one you must see as your enemy, albeit one with whom you must treat with courtesy, even if questions appear impertinent.

f) Barristers are NOT required to ask questions where the answers may detract from their case. Again, this may seem unfair, but it is how it works. That is why you need a defence barrister. Not only will they correct any slant that the other barrister puts on issues – they can raise issues in your favour. REMEMBER, THE TRIBUNAL WILL NOT KNOW THINGS THAT HAVE NOT BEEN EXPLAINED TO THEM. They will not seek out information that is not presented to them, unless you are lucky. Remember, also, that you cannot examine yourself – at least, without it looking very odd.

g) Hostile counsel will sum up at the end of examination – to try and show you in a bad light. Friendly examination will do the opposite. It would be unwise to forego the benefits of the latter.

h) While facing awkward questions, fortify yourself with the thought that your counsel will shortly lead you through these points in a more supportive way.

i) Barristers may return to subjects they have previously covered. This is often allowed, to a degree, in tribunals unless it is excessive, and if it is seen as assisting getting at the truth. You can say something like "I think I have answered that already, but, for the avoidance of doubt… (then repeat your previous answer).

As an example, lets suppose that you've been instructed on a case involving annuities. It emerges that one party might have obtained a better annuity rate had there been consideration of their medical condition in the rate used. You have used a standard annuity rate in your work – the client subsequently makes a formal complaint, and there is an investigation.

A hostile barrister will imply in their questions that you have been negligent in not enquiring about the client's medical health. However, your barrister may then work on the basis that you should have been told about the condition, and point out guidance that relates to, e.g., your instructing solicitor. This would strengthen your defence.

It's important to show that you take a serious and diligent approach to your work in general. If it can be demonstrated that you have done this in other areas of your work, any tribunal will be favourably impressed.

In part 3, the final part of this series, I will discuss empathy and courtesy – two factors that will support your professional life – especially when you are under stress.

Disputes over Automated Decision Systems: Algorithmic Assessments by ICT Forensic Expert Witnesses

by Dr Stephen Castell

Dr Stephen Castell, award-winning ICT systems and software consultant professional, and FinTech visionary, active as an international expert witness in major complex computer software and systems disputes and litigation, including the largest and longest such actions to have reached the English High Court.

Introduction

There is a rapidly increasing use of Artificial Intelligence (AI) and Machine Learning in the deployment of Automated Decision Systems (ADS) in social, employment, legal, business and economic administration, in both the public and private sectors. Computer software-implemented algorithms, or 'algos', are spreading across a wide range of expanding application areas. As the demand for AI and Machine Learning expertise relentlessly grows across all industries, sectors and practices, professionals will inevitably find themselves needing to assess more closely the 'legal and social (re)liability of AI' [Castell (2021b)]. Disputes and litigation over the use, and the damaging consequences of the use, of ADS are likely to be a growing feature of 'algo' social and professional life, in business and in government, going forward, and I suspect that ICT expert witnesses are going to become involved, to one extent or another, in assessments of such disputes, whether in the Criminal or Civil Courts, and/or before other Tribunals.

Expert Experience of an ADS case: Investor v Fund Manager

I was recently engaged as expert witness, and gave sworn testimony, in a Financial Industry Regulatory Authority (FINRA) Arbitration hearing in Massachusetts, USA. The case was a dispute over use of an Automated Decision System by a major US fund management corporation to close-out the investment trading position of a client, allegedly negligently, with heavy USD losses to its client. I set out below a shortened, sanitized and anonymized version of my testimony material, but otherwise essentially verbatim.

The technical issues at the heart of the case were:
• What 'algos', programmed trading, or AI software did the fund management corporation use?

• Whether or not the fund management corporation did use such ADS, did it anyway fail to use 'reasonable professional skill, care and diligence' in its (necessarily software-assisted) management/expert judgement, decision and execution of trade close-outs on behalf of a client to whom it arguably owed a fiduciary duty 'to hold harmless'?

Answers to Attorney's Questions posed to **Dr Stephen Castell,** sworn and under Examination in Investor v Fund Manager – US Arbitration

Q1) Please state your name and occupation
My name is Stephen Castell. I am an independent computer software and systems consultant and expert professional, operating through my own company founded in 1978 and known as Castell Consulting.

Q2) What is your background in this field and how many years of experience do you have?
I have bachelor's and master's degrees in mathematics, physics and computer science, and a doctorate in mathematics, plus Chartered Membership of Mathematics, Physics, Computer, Management and Expert Witness Societies, Associations and Institutes. I have forty years of training, management and business experience in computer and communications consultancy, in a wide range of sectors, including financial services, and as a senior IT and corporate executive of a London boutique investment bank. I have been interviewed for Archives of IT:
https://archivesit.org.uk/interviews/stephen-castell/.

Q3) Have you provided testimony in legal proceedings?
Yes, many times.

Q4) Has your testimony been for both the plaintiff side as well as the defense side? Have you testified in American federal court?
Yes, testimony for both plaintiffs and defendants, in several jurisdictions, including in American federal courts.

Q5) Who are some of your most high profile clients?
HM Treasury – a foundational research study of the legal security and reliability of computer software, systems and media, carried out for the five principal UK Departments of State, published as The Appeal Report, 1990.

GEC-Marconi – GEC-Marconi v LFCDA, 1991-93; multi-million dispute over 'functionality extras' in the development of the London Fire Brigade Mobilising System, the longest software contract case – over a year – to be heard in the English High Court.

Misys plc – AVCC v CHA, 1997-98, Sydney Supreme Court; multi-million Australian Universities administration automation system procurement dispute (eventually settled at a Mediation under Sir Laurence Street).

Airtours plc (now MyTravel plc) – Airtours v EDS, Claim No. HT00/000305, English High Court (Queen's Bench Division - TCC), 2001; high-profile largest computer software and outsourcing contract action to come to trial in the English High Court (£200m claim; £50 counter-claim).

DirecTV – United States District Court, Eastern District of Texas Beaumont Division, Civil Action No. 1:05-CV-0264, 2005; Prior Art research and testimony defending a multi-million infringement action concerning US Patent No. 5,404,505.

UK and International Banking Systems Supplier: Canadian Arbitration, Toronto, 2006-2007; dispute over a major systems contract/project failure, between a leading banking group's Lending Division and one of the world`s principal software and systems suppliers of banking systems.

Sempra Metals – Claim No HT-05-366, English High Court (TCC), 2006-2007; legal action between a leading City metals trader and a specialist front-to-back commodities trading and back-office software package supplier.

ERG Ltd / Videlli Ltd – PTTC v ERG, 2010-2012, NSW Supreme Court, Australia; very high-profile IT systems contract dispute over the failed 'TCard' Integrated Ticketing and Transport System project, involving a claim for AU$90m, with a cross-claim for AU$200m+.

Kaspersky Lab – Lodsys v Kaspersky, 2012-2013, Texas Court; Prior Art research and critical testimony for multi-million high-profile 'patent troll' US Patent Dispute.

Permanent Court of Arbitration, ICC Paris – Technical Expert to Arbitral Tribunal, 2017-2018; a $0.5bn dispute between one of the largest US Global Corporations and a Sovereign Sate. Data forensics investigation in regard to authentication of circulation and signing of a key electronic document.

Leading Financial Real-Time Markets Trading, Dealing and Administrative Systems Supplier – multi-million dispute with major international Swiss-based investment banking group over alleged faults in 'algo trading' software system supply, 2021; settled prior to action after provision of my report assessing presence of 'software material defects'.

US Attorneys for Plaintiffs in multi-million Cassidy v Voyager Class Action – cryptocurrency trading and services company, misrepresentations of software functionality and investment performance (UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA CASE NO. 21-24441-CIV-ALTONAGA/Torres), filed December 2021.

Q6) Do you have any stock or other holdings in Fund Manager?
No.

Q7) Are you familiar with computer algorithms and automated systems?

Yes. All computer software applications are fundamentally constructed of, and implement, algorithms, providing functionality that meets defined systems Requirements, for varying degrees of automation.

Q8 Are you also familiar with automated decision systems which involve a combination of human and machine in the decisional process?
Yes. All automated decision systems, implemented in and as computer applications software, are essentially under the management and governance of, humans, so that they necessarily involve a combination of human and machine in the decisional process. There may routinely be a high degree of autonomous decision-making operationally, in real-time, by the machine, with little, or no, human intervention needed. However, ultimately humans are practically responsible for the decisions taken by, and liable for the consequences of, those automated decision systems.

Q9) How much may algorithms and automated systems be useful in the financial industry? (or for a financial institution)
The financial industry has invariably been one of the most demanding of such systems, with a steady appetite for advances in technologies and techniques implementing and providing increasingly automated processes, more complex algorithms, faster decision-making, enhanced 'big data' processing and analysis, greater efficiency in and reduced costs of trade and transaction execution and confirmation and, ultimately, improved certainty, security, quality and scale of financial returns and profits.

Q10) In your experience, have you dealt with cases where you have a computer system that is supposed to serve two interests that are diametrically opposed to one another, i.e. different financial stakes in the subject matter?
(i) In my professional experience, every computer system is to be conceived, designed, specified, built, operated and managed to meet certain defined Requirements. Those Requirements may certainly involve or imply delivering functionalities that endeavour to serve interests that are diametrically opposed to one another. For example, the very first commercial computer systems were built to automate the accounting and bookkeeping functions within enterprises: on the one hand, such systems served the interests of the executives and owners of the enterprise by cutting costs, enabling business expansion without increasing administrative resources, providing an improved service to customers, and reducing headcount, all with a bottom-line increase in sales turnover and net profits. On the other hand, such systems served the interests of employees who, despite being diametrically opposed to increased work load (often for no increase in pay), and the threat of redundancy through reduced headcount, nevertheless enjoyed greater technology upskilling, with a bottom-line improvement in their individual job security and opportunities, career development, quality of livelihood, and financial compensation.

(ii) As Group Management Services Manager (CIO) for Bremar Holdings Ltd, International Investment Bankers, in the mid-1970s, I personally designed algorithms and implemented computer systems that not only enhanced the efficiency, financial performance and profits of the bank, but also provided improved services, opportunities and profits to clients of the bank. For example, for Bremar's core Eurocredit and Eurodollar Trading operations, I developed and coded a 'banking paper' bid-and-offer non-linear programming model and algorithm, for use in the daily sales negotiation activities of Bremar's Traders. My model and algorithm had functionality that took account of variables such as volatility, type of option, underlying paper price, timing 'rests' of interest payments, strike price, and forward rates, assisting traders determine the fair bargain price for a call or a put option (the 1997 Nobel Prizewinning Black–Scholes Model, which my work pre-dated by over twenty years, essentially employed the same algorithm). Use of the algorithm enabled negotiation of an informed bid-and-offer-driven sale transaction price that optimised the profits for both Bremar and its counter-parties – i.e. it was a 'win-win' algorithm, for both the seller, and the buyer, of the traded 'paper', where these parties are usually seen as having diametrically opposed interests.

Q11) What part does human judgment play in relation to today's sophisticated computer systems and algorithms?
As noted earlier, there may be a high degree of autonomous decision-making operationally by today's sophisticated computer systems and algorithms, with little human intervention needed for their operation. However, in my experience, and as a matter of professional practice, ultimately human judgment is always responsible for the decisions taken by, and liable for the consequences of, those automated decision systems.

Q12) We are hearing in the news of algorithms and concerns about bias (e.g. in the job application setting, and electronic communications platforms). So can there be a built-in bias in algorithms?
The issue of 'bias' in algorithms in the news and social and other media can in my view be amateurishly conceived and expressed. The fundamental principle of professional software construction and delivery is that every computer system, i.e. every implementation of one or more algorithms, is to be conceived, designed, specified, built, operated and managed to meet certain defined Requirements. Someone has, or had, to define those Requirements, 'own' them, be responsible – and liable – for them: we talk in professional terms of their being an identified Requirements Authority. Thus, whatever is conceived, defined and detailed, by humans, within the Requirements Specification, is the functionality that the algorithms, the computer software, is intended and due to deliver.

Essentially the only evaluative judgment that therefore falls to be made about the eventual delivered and operated software system, i.e. the executable

algorithms, is the objective assessment as to whether or not the system meets, i.e. is materially compliant with, its defined Requirements. When the system does materially comply, we judge and say that the software system and its implemented functioning, operable algorithms are 'of sufficient quality and fit for purpose'. There is here no meaning, or place, for evaluation of subjective allegations of 'bias'.

It may be that some other party takes the personal subjective view that the purpose or consequences of said algorithm demonstrates 'bias'; but that view can have no place methodologically or professionally (or, as I have often been advised by Learned Counsel, legally) in judging the system's fitness for purpose.

If there is any 'bias' to be alleged or assessed in any computer software-implemented algorithm, then it is not to be looked for in the algorithm (which would be meaningless), but in the process by which and by whom the Requirements for the functionality of the software, for the purpose and operation of the algorithm, were conceived, defined and specified. As I put this truth in a recent paper:
Castell's Second Dictum: "You cannot construct an algorithm that will reliably decide whether or not any algorithm is ethical" [Castell (2018)].

Q13) In this case one of the issues is whether, in a liquidation following a margin call, whether there was a significant departure from the margin deficit in making such a high liquidation. What information would you like to see to get to the bottom of what happened?
Irrespective of the subjective issue of possible 'bias' in the Requirements, there may always be software defects, deficiencies, intermittent operating faults etc in the system – 'bugs'. Taking this into account, the information that would in my experience need to be provided and examined in order to investigate as to whether or not there was "a significant departure from the margin deficit in making such a high liquidation" includes:

- The Requirements Specification of the System.
- The Software Development Records.
- The System Operational Records (including fault logs, incident reports/tickets etc).
- Materials pertaining to the particular 'margin deficit' and 'liquidation' incident parameters at issue – identification of the specific software code/algorithm functions where the relevant 'margin deficit' and 'liquidation' processing and decisions were executed in the System; details of like and surrounding trades (to check for patterns, consistencies, anomalies etc); applicable market data upon which the decision functionality was conditioned and/or relied.
- The Management, Technical and User Guides for the System.

Q14) Advanced as they are today, could an algorithm be designed that would not only take into account the ability of Fund Manager for example to maximize profit or protect profits in a volatile market, but also identify promising stocks that are swimming against the grain?
Yes. Algorithms can in principle be designed to do anything – they are only limited by the intelligence, imagination and experience of their conceivers, the skill of their software coders and the capabilities of the available technologies and resources.

For example, my own consultancy defined, designed and built a real-time commodities, OTC, derivatives and futures programmed-trading, mid-office, investor-handling and administration system for a commodity-trading entrepreneur client. Based on high-quality thinking, proprietary economic models and mathematical techniques, and using sound charting tools and quality data analytics, it delivered when launched dealing gains for clients of, typically, 20% per month (sic), with an equally successful unique dynamic stop-loss downside-risk-limiting feature.

Q15) Have you read the 'Statement on Algorithmic Transparency and Accountability' of the Association for Computing Machinery, US Public Policy Council (USACM)? Is it possible, as it says, for well-engineered computer systems to have unexplained outcomes or errors? Why?
Yes [Association for Computing Machinery US Public Policy Council (2017)]. As said earlier, irrespective of the subjective issue of 'bias' in the Requirements, there may always be software defects. There are many reasons for these, range from inadequately defined, detailed or documented Requirements, inappropriate or poor choice of design, and badly project managed construction and/or unsuitably skilled and experienced software programmers, to deficient or incorrectly planned or executed testing, faulty installation, deployment or implementation, and insufficiently reliable operational maintenance and update.

And there is also the reality of the ontological unreliability of software: computer science experts well know that, as a result of Gödel's Incompleteness Theorem: 'The only thing that can be said with certainty about software is that it is definitely uncertain'.

Q16) Are algorithms advanced to the stage where companies are able to quickly change them in a rapidly changing business environment? Would you expect that to be the case for a market actor such as Fund Manager?
Yes; and yes. However, the capability for rapid, business-reactive code changes and software re-versioning, re-purposing, re-testing and re-deployment has to be 'designed-in' from the start. In my experience, it would be surprising if a market-leading financial institution like Fund Manager did not essentially have this embedded capability designed-in to its systems, to one extent or another.

Q17) And are these changes made by highly specialized individuals such as yourself or are systems at the point now where they can learn to make the changes without human involvement?
There is increasing interest and research in, and trialling of, 'self-learning' computer programs, but

they so far have relatively limited proven application, mostly within the software coding industry itself. Changes in serious-scale commercially deployed systems are still for the most part made by highly specialized individuals, IT professionals.

See for example:
https://www.forbes.com/sites/simonchandler/2020/02/05/how-ai-is-making-software-development-easier-for-companies-and-coders/?sh=11de42726641

How AI Is Making Software Development Easier For Companies And Coders Feb 5, 2020. Artificial intelligence is the result of coding, and now coding is the result of artificial intelligence. Yes, AI has come full circle, because more companies and more coders are using it to aid the software development process.

Q18) Are there benefits to the public of having some level of transparency of algorithms in the financial industry? What suggestions, if any, do you have on this subject?

This is an interesting subject, and part of the wider debate about independent oversight and monitoring of (the Requirements for) algorithms, particularly as regards 'Government by Algorithm'. This is a something that I have explored in my recent learned journal paper [Castell (2021b)], giving some of my own innovative and professional suggestions.

In the financial industry there is already a level of transparency in regard to regulatory oversight – for example, audit by/reporting to regulators of systems compliance with KYC, AML, MIFID, MIFIR etc rules and protocols.

One of the major issues that I can see with greater 'transparency' would be the commercial confidentiality, and the 'proprietary edge or advantage', of the algorithms, which their proprietor financial institutions would, one expects, wish fiercely to protect and preserve. They would probably also argue that imposing wider transparency would reduce the motivation of enterprises within the industry to develop new, improved algorithms, and constrain overall competitiveness in the industry – neither of which would be of benefit to the public, their customers.

Conclusions

I suspect that the type of case above, Investor v Fund Manager, derived from my own recent experience, and the sort of issues raised therein, are increasingly going to feature in the financial investment world – for example, in regard to people's pension funds and their management – as AI and ADS relentlessly 'take over autonomously' in financial servicers and, indeed, in all other sectors. Furthermore, recent high-profile examples of software failures and associated disasters and tragedies, such as VW Dieselgate, Boeing 737 Max, and PO Horizon, serve to point up the critical issues that can only escalate as widescale software implementations, including ADS, become more deployed and firmly entrenched [Castell (2021b), (2020), (2021c)].

Care should be taken professionally when the subjective issues of 'bias' or 'ethics' in algorithms are raised. It should be made clear to instructing lawyers and the courts that they must properly look for review of the subjective concepts of 'bias' and 'ethics' in the processes and protocols of the humans who specified those Requirements. They should not expect to find any technical evidence thereof in the computer code itself.

Duly-diligent forensic ICT Professional expert investigation of such cases must also guard against the incorrect 'presumption of the reliability of computer evidence' that worryingly seems to have crept into pleadings brought before some courts, particularly in Criminal Cases, and to have been accepted unchallenged by presiding judges. [Castell (2021a)].

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Privacy in the Context of Criminal Investigations: Bloomberg LP v ZXC [2022]

by Ian Clarke at 1 Chancery Lane

On 16 February 2022 the Supreme Court handed down their unanimous judgment in *Bloomberg LP v ZXC* [2022] UKSC 5. The Court held that, in general, a person who is under criminal investigation has, before being charged, a reasonable expectation of privacy in respect of information relating to that investigation.

The claimant, ZXC, is an American citizen who has indefinite leave to remain in the UK. He worked for a publicly-listed company and became the chief executive of a regional division of that company. ZXC brought a claim for misuse of private information ("MPI") after Bloomberg published an article relating to the activities of a company in ZXC's division that had been subject to a criminal investigation by a UK law enforcement body.

One of the issues that the Supreme Court had to resolve was whether the Court of Appeal had been wrong to hold that there is a general rule that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.

In answering that question, the Court considered the judgment of Sir Anthony Clarke MR in *Murray v Express Newspapers plc* [2008] EWCA Civ 446 which endorsed a two-stage test for whether there had been a misuse of private information: at stage one the question is whether the claimant had a reasonable expectation of privacy in the relevant information; if so, at stage two the question is whether that expectation is outweighed by the countervailing interest of the publisher's right to freedom of expression.

At [§36] of *Murray* it was noted that *"the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case"*. Those circumstances are likely to include what have become known as the "Murray factors", which are:
(1) the attributes of the claimant;

(2) the nature of the activity in which the claimant was engaged;

(3) the place at which it was happening;

(4) the nature and purpose of the intrusion;

(5) the absence of consent and whether it was known or could be inferred;

(6) the effect on the claimant; and

(7) the circumstances in which and the purposes for which the information came into the hands of the publisher.

At [§72] the Court held:
"We consider that the general rule or the legitimate starting point adumbrated in the courts below in relation to this category of information is similar to what can be termed a general rule in relation to certain other categories of information. It has already been recognised that a consideration of all the circumstances of the case, including but not limited to the so-called Murray factors, will, generally, in relation to certain categories of information lead to the conclusion that the claimant objectively has a reasonable expectation of privacy in information within that category. The most striking example of such a category is information concerning the state of an individual's health which is widely considered to give rise to a reasonable expectation of privacy: see McKennitt v Ash [2005] EWHC 3003 (QB) at para 142 per Eady J, and in the Court of Appeal at para 23 per Buxton LJ. There can of course be exceptions even in relation to information concerning the state of an individual's health, but generally, details as to an individual's health are so obviously intimate and personal that a consideration of all the circumstances will result in that information being appropriately characterised as private under the stage one test unless there are strong countervailing circumstances".

Accordingly, the first question to be answered was whether the courts should proceed from a similar starting point of there being a reasonable expectation of privacy in respect of information that a person is under criminal investigation.

The Court carefully analysed the existing case law and Bloomberg's arguments, yet rejected those submissions. At [§144] the Court held:
"A determination as to whether there is a reasonable expectation of privacy in the relevant information is a fact-specific enquiry which requires the evaluation of all circumstances in the individual case. Generally, in setting out various factors applicable to that evaluation, including but not limited to the Murray factors, it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight. However, in respect of certain categories of information, such as the information in this case, a consideration of all the circumstances and the weight which must be attached to a particular circumstance ***will generally result in a determination that there is a reasonable expectation of privacy in relation to information within that category. In respect of those***

categories of information it is appropriate to state that there is a legitimate starting point that there is an expectation of privacy in relation to that information. *We prefer the terminology of "a legitimate starting point" to emphasise the fact specific nature of the enquiry and to avoid any suggestion of a legal presumption, as noted above in para 67. We consider that the courts below were correct in articulating such a legitimate starting point to the information in this case. This means that once the claimant has set out and established the circumstances, the court should commence its analysis by applying the starting point".*

The notion that the starting point for the stage one exercise is that there is an expectation of privacy has caused a degree of consternation in some quarters of the media who fear that the Court's judgment in ZXC will deter the publication of stories concerning police investigations. However, the decision needs to be read fully and in context.

In the passage quoted above, Lord Hamblen and Lord Stephens (who delivered the Court's unanimous judgment) made the point that the phrase *"legitimate starting point"* was used so as not to give the suggestion that they were laying down a legal presumption. Whilst the starting point may be therefore that information about a criminal investigation is likely to be presumed to be private, courts are still required to evaluate all the circumstances of the particular case.

Moreover, the Court was setting out a presumed starting point in relation to the stage one enquiry. The Court at [§76] made the following point:

"[T]his ground of appeal is confined to the stage one test. Even if information is characterised as private it would still be capable of being published if outweighed at stage two by the countervailing interest of the publisher's right to freedom of expression in accordance with article 10 of the ECHR ...".

It is clear therefore that while an individual ***may*** well have an expectation of privacy in relation to a criminal investigation, that expectation can be overridden in appropriate circumstances in light of a publisher's Article 10 rights.

Further still, it was common ground that *"whenever a person is charged with a criminal offence the open justice principle generally means that the information is of an essentially public nature so that there can be no reasonable expectation of privacy in relation to it".*

Whether *ZXC* will have any real consequences for the ability of the press to run stories about criminal investigations remains to be seen. However, on a more prosaic level, police forces will have to have the issue of privacy in mind during their day-to-day activities and in how they reveal intentionally or inadvertently, the fact of an investigation to third parties.

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The Collision Between Infrastructure & Carbon Emissions

by Dr Mark Hinnells
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Introduction

There is an ongoing collision taking place between the development of large-scale infrastructure in the UK and the UK's carbon targets. Infrastructure (including airports, toll bridges and roads, oil and gas facilities, energy generation, water treatment plants and commercial real estate) takes a long time to develop, secure planning consent, finance and build, and in the period between conception of development projects and them actually being in front of a decision maker, the need to reduce carbon emissions has become more and more urgent.

When infrastructure reaches a planning decision, the framework against which it is assessed has often moved faster than the thinking on design. Infrastructure is too often planned with inadequate analysis of the impacts on carbon emissions, and thus with minimal or insufficient mitigation. More decisions are likely to be subject to appeal or judicial review, or risk being called in by the Secretary of State.

Climate change has been an issue for infrastructure development since the 1992 United Nations Framework Convention on Climate Change (UNFCCC), but the urgency of climate action has increased, particularly in the UK with the Climate Change Act (2008). This included an 80% cut in carbon emissions, a five-yearly budgeting process to get there, and the set-up of an independent Climate Change Committee (CCC) to advise on targets and measures. The Paris Agreement (2015) aims to keep the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5°C. It is widely recognised that this needs net-zero carbon emissions by the middle of this century.

Following Paris, the UK amended its target in the Climate Change Act in 2019, from an 80% reduction to a 100% reduction by 2050. This tougher carbon target required carbon budgets to be reconsidered, and the UK committed to a 67% cut (compared to 1990 levels) by 2030, and a 78% cut for the sixth carbon budget (2033-2037), and then in April 2021 decided to include international aviation and shipping within that target.

Cases where this collision has become evident include airports (with refusals leading to public inquiries at Stansted and Bristol, and consents being withdrawn for reconsideration at Manston); road schemes (with legal challenges to the Road Investment Strategy 2 and then particular projects like the A38 Derby Junction); and energy projects, like the proposed coal mine in Cumbria. A new major building in London, the Tulip, was refused on grounds that included embodied carbon.

What is current policy?

The difficulty we face at the present time is that policy is not clear. New targets have been announced (particularly the 78% cut in emissions, including aviation in the sixth carbon budget period) so the target is clear. Except that the UK is behind on meeting the fifth carbon budget target, let alone the sixth, and detailed policies have not been announced to deliver the sixth carbon budget.

The Government has more than once refused to release its analysis of UK carbon targets and how each sector is contributing to the net-zero goal, following a request by the Press Association news agency for the information under Environmental Information Regulations (EIR).[1]

The CCC has concluded that: *"An ambitious heat and buildings strategy is urgently needed; delayed plans on surface transport, aviation, hydrogen, biomass and food must be delivered; plans for the power sector, industrial decarbonisation, the North Sea, peat and energy from waste must be strengthened."*[2]

The House of Commons[3] and House of Lords[4] have added their criticisms of the strategy, and Client Earth, Friends of the Earth and the Good Law Project filed separate claims early this year, arguing that the Government has breached its legal obligations under the Climate Change Act to demonstrate its climate policies will reduce emissions enough to meet the legally binding carbon budgets. The cases have been granted permission to proceed to the High Court and will be heard together in a full hearing expected to be in June 2022 with a decision later in the year.[5]

The energy security strategy announced on 6 April[6] fell well short of what was needed. It failed to tackle on-shore wind, which could be the fastest to build and is the cheapest form of power generation available today. It didn't even mention tidal lagoons as a long-term baseload renewable energy option. It failed to add any new support for energy efficiency at home and in businesses. Ricardo is supporting businesses to tackle electricity prices that are expected to almost triple (from around 12p to around 30ppkWh). Our clients will not be helped to bring forward proposals for onsite, or near-to site but directly connected, wind and solar projects under this new strategy. Government is failing to support its own carbon targets with the detail to deliver.

Aviation

Government has consulted on a strategy to get to net-zero aviation (the Jet Zero Consultation[7] summer 2021). The strategy laid out a desire for a 60% increase in capacity, and stated this was compatible with net zero (which is now a duty in law). However, the strategy relies on:

• A rate of improvement in aircraft efficiency that is hard to see happening in reality (being faster than international historical rates and the UK does not have the vires to increase the rate of improvement through regulation).

• A high rate of implementation of so-called Sustainable Aviation Fuel (SAF), derived largely from wastes or biomass. This requires a wholesale industrial transformation of fuel supply. Though proposals have been consulted upon which might drive the use of SAF up to 75%, these are not yet law; refining capacity does not yet exist; prices and supply chains are unknown; and engines are not certified above 50% use.

• Uptake of hydrogen and electric aircraft, which are not yet technically or commercially proven.

• Offsetting measures that depend on an offset market, which is currently unregulated.

That's not to say that those technologies don't have potential, they clearly do, and I'm pleased to say Ricardo is involved in supporting development of all of these measures. Ricardo manages the SAF innovation programme for the UK Government (the Green Fuel Green Skies competition[8]); we have a fuel-cell-powered aircraft in the air[9]; and we are part of a consortium developing an electric drivetrain for aircraft[10]. The potential is not the issue. The issue is whether the Secretary of State can deliver a policy framework to deliver sufficient change to fulfil his legal duty, and that is the subject of reasonable doubt. Thus, there is a genuine question as to whether there is a case for capacity constraint until such technologies can be proven to deliver. That was the proposition made by the CCC in their sixth carbon budget recommendations[11], but not (yet, anyway) accepted by the Government.

The key test in airports planning policy is whether expansion would put at risk the UK carbon targets[12]. To date, planning inspectors, like those at the Bristol Airport expansion public inquiry, (refused on grounds that included carbon emissions, but allowed on appeal), have taken the view that it was reasonable to rely on the assumption that the Secretary of State would, in due course, fulfil their duty to meet the targets in the Climate Change Act[13]. The Government, they concluded, had indicated expansion would be compatible with net zero, and thus it was safe for them to consent to an expansion. But relying on that assumption may get harder.

A further issue is that it would be easier to judge an additional airport development, against progress within aviation as a whole, if each sector had a defined target. There is no obligation on an airport seeking expansion to conduct a cumulative impact assessment in carbon emissions terms, compared to other recent airport proposals, and compared to a carbon target for aviation. But that's because at the present time, there is no binding and separate aviation carbon target (or target for any economic sector come to that). The target is for the UK as a whole.

So, should it be a material consideration to a planning officer considering an airport that we don't know how much aviation will be allowed to emit, compared to say, housing, in any given time period?

Is it safe to consent an airport expansion when the Secretary of State is relying on unproven technologies, limited commercialisation, non-existent markets and missing cumulative impact assessments? Or should we pause airport expansion until the technologies and markets that the Secretary of State is relying on are proven? At some point in time, the argument will be tested as to whether the Secretary of State is acting reasonably in such a reliance on unproven technologies and markets in discharging a duty laid out in the Climate Change Act. At some point, decision makers may conclude the Secretary of State is not acting reasonably. Indeed, it may be so unreasonable[14] as to be *'Wednesbury unreasonable'*.

Proponents of expansion will undoubtedly argue (as at Bristol and Stansted) that further facilities like hydrogen or electric refuelling could be added later under permitted development rights (airports are a statutory undertaker and have significant rights) and thus don't need to be in a planning application for airport expansion. On the other hand, if they are not in the application, they can't be considered to be mitigations against the increased emissions, and the UK carbon target is thus put at greater risk, and this, in turn, surely jeopardises consent.

Figure 1 Airports developments facing challenge from carbon emissions targets

1. Heathrow Airport. The basis for a third runway at Heathrow has been up to the Court of Appeal and Supreme Court. At issue was whether the Airports National Policy Statement considered carbon emissions and particularly the 2015 Paris Agreement. Eventually, the Airports National Policy Statement (ANPS) was reinstated, though it was recognised by the Supreme Court that any future applications for development consent would be assessed against the emissions targets and environmental policies in force at the time, rather than those set out in the ANPS (the decision, para 10, and para 98). In addition, there are emissions from aviation that have climate-change impacts other than just carbon emissions. Paras 159-166 discuss non-carbon warming impacts in some detail, and conclude it was not irrational for the Secretary of State not to consider them, but it would be rational for the applicant for a Development Consent Order to have to address the environmental rules and policies that were current when its application would be determined, and this could well include non-CO2 warming impacts. This decision, that policy is updated, has implications for other airports and potentially, other infrastructure. Heathrow has set out a plan to achieve net zero by 2050, but the plan has not been tested as part of any application.

2. Manston Airport was consented, but subsequent judicial review proceedings were not contested by the Government and developer, and consequently the consent was withdrawn, pending a new decision.

3. Stansted Airport expansion from 35 to 43 million passengers per annum was consented after a public inquiry. The council and opposition groups, with the status of Rule 6 parties, took the decision to judicial review, but were refused a review.

4. Bristol Airport expansion from 10 to 12 million passengers per annum was consented after a public inquiry . The decision included a requirement for a Carbon and Climate Change Action Plan (Condition 9). The plan seems to have set a template for expansion proposals at other airports.

5. Leeds Bradford Airport. The local planning authority (LPA) resolved to approve the expansion, circa 3.5mppa, but the Government has issued an Article 31 Direction that prevents a decision being issued until the Government has decided whether to call in the application for a public inquiry. If consented, planning condition 37 would require submission of a carbon and climate change action plan to be submitted and approved. The S106 is to include net-zero carbon from all ground-based operations.

6. Southampton Airport. The LPA has recently resolved to approve (subject to a legal agreement) the extension of the runway by 164m, which will allow larger aircraft to use the airport. However, arguably there were very particular local circumstances, given the liquidation of Flybe, and the dispersal of fleet that could use the shorter runway, as well as significant surface access traffic constraints. Consequently, much of the impact from the development is restoring the airport to previous operations.

7. Luton Airport. The airport applied for consent to expand from 18 to 19 million passengers, was consented at local level, but has now been called in by the Secretary of State for a local inquiry.

Roads infrastructure

The Roads Investment Strategy (RIS2) and National Policy Statement for National Networks (NPS NN) have been challenged by Transport Action Network (TAN) on environmental, particularly climate change, grounds.

RIS2, which set Highways England's (HE) objectives and funding resources (£27.4bn) for the expansion of the UK's strategic road network, has been subject to judicial review for inappropriate consideration of carbon. TAN claims RIS2 will make carbon emissions from the roads network go up by about 20 MtCO2, during a period when we need them to go down by about 167 MtCO2. TAN thus claimed the programme will negate almost all of the reductions from increased take-up of electric vehicles, and thus RIS2 is incompatible with our legal obligation to cut carbon emissions in line with the Paris Agreement and the Climate Change Act and should be cancelled. However, the High Court eventually ruled that the Secretary of State for Transport did not fall foul of the law in approving the Road Investment Strategy.

The NPS NN was also subject to legal challenge from TAN on the basis it doesn't allow decision makers to seriously consider climate change, and was claimed to be outdated regarding air pollution, natural capital (biodiversity) and design. The Government announced they would review the policy, but would take up to 2023 to do this. In the meantime, the NPS would continue to have effect, despite this effect also being the subject of challenge.

As well as challenging the policy framework, individual schemes under the framework (such as the A38 Derby Junction Scheme) are also subject to challenge.

Figure 2 Road building projects

8. A38 Derby Junction Scheme. Inspectors recommended the DCO be approved, subject to the Secretary of State making decisions on carbon emissions under the Paris Agreement. However, local campaigners launched judicial review proceedings against the decision on the basis of carbon emissions, and the Government has withdrawn the decision and a new one will need to be made .

Real estate

The Tulip, a proposed skyscraper in London, was first consented by the City of London, and then refused by the Mayor, and finally refused on appeal in November 2021 on grounds that included embodied carbon. The appeal decision notice discussed embodied carbon extensively, in particular para 44: *"Extensive measures that would be taken to minimise carbon emissions during construction would not outweigh the highly unsustainable concept of using vast quantities of reinforced concrete."* [15]

Berkeley Group achieved outline consent in 2017 for the masterplan for Southall Waterside in Ealing, for nearly 4,000 homes to be built over 25 years. The low-carbon solutions approved in the planning consent are not necessarily the same solutions appropriate to achieving net zero, likely to be required under building regulations for future phases. Ricardo has worked with Ealing Council and Berkeley Homes to explore potential solutions.

Energy infrastructure

Several energy assets have been through appeals and public inquiries, not to mention the many wind projects that have gone to appeal. Drax won its consent, but didn't go ahead with the project. A decision is awaited on West Cumbria coal.

Figure 3 Energy projects

1. Drax Power. The Court of Appeal upheld Drax's power station DCO despite its carbon emissions impact, but the court was clear carbon must be weighed in the planning balance. Also to be weighed in the planning balance was that the power sector has made huge strides in decarbonisation and there was a need for plant (either gas plant like this, or storage) to offer grid stability alongside decarbonisation. However, following this decision, Drax decided that it would not construct the consented project, but would focus instead on becoming carbon negative by 2030 (generating power using biomass with carbon capture and storage)

2. West Cumbria Coal. After the LPA resolved to grant planning permission the Secretary of State decided that there had been changes since his original decision, particularly the Climate Change Committee's sixth carbon budget recommendations that raised issues of more than local importance, and as a consequence he called in the application for a public inquiry. The decision of the public inquiry is awaited. Even if consented, the proposals are reportedly facing uncertainty over financial backing.

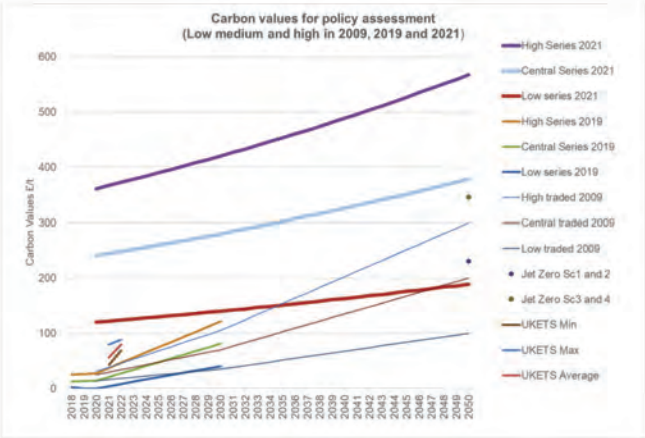
Business planning risks

There is a key difference between planning decisions and investment decisions. Planning decisions must consider policy as it exists now (and that's quite hard when it's moving very rapidly). But investment decisions require an assessment of future risk, including the risk that policy might change, and threaten costs or income streams before the asset pays for itself and starts to make steady returns to investors.

In September 2021, the Government published new valuations of carbon emissions. It has been publishing its forward view of the value of carbon every two years since 2009, given future carbon targets. The September 2021 valuations were the first since the amendment of the Climate Change Act to net zero, and since decisions on the sixth carbon budget.

The carbon valuations were based on the cost of measures to deliver targets and indicate that, in one way or another, policy should internalise carbon valuations. One way might be through changing the number of permits available under the UK Emissions Trading Scheme over time to drive up price. Another might be an obligation to use SAF.

Figure 4 Carbon Values for policy assessment [16]



Nowhere is policy risk to future revenue greater than in airport expansion, from a combination of changing carbon values and changing policy.

An example is the non-carbon warming impact of aviation. The total warming impacts of aviation (including contrails and other effects) are up to three times the direct warming from carbon, and though we have known about this issue for two decades, an element of scientific uncertainty means there is no current policy that requires airport planning to consider non-carbon warming. To meet Paris objectives and limit emissions to keep warming to between 1.5 and 2 degrees, any and all sources of warming must be addressed at some point. Thus, there is a clear economic risk to airport investment even if a development is consented.

Task Force on Climate-Related Financial Disclosures (TCFD)

The TCFD was formed at G20 level in a bid to encourage the uptake of unified climate risk and opportunity measurement and disclosure internationally and across the private sector. It first published its framework in 2017, outlining guidance for disclosures regarding governance, strategy, risk management and climate targets. TCFD reporting became mandatory in the UK from 6 April this year.

Governments, businesses, banks and even pension schemes planning investment in infrastructure must recognise that incomes may be at risk or costs may be higher. Thus, building infrastructure may get harder than consenting infrastructure. Or worse, infrastructure may get built, but become a 'stranded asset' if it is not able to be operated as intended.

Pension funds and infrastructure

Significant infrastructure is owned by pension funds. Pension funds have been supportive of, for example, airport expansion, because of the perceived improved return to pension fund members, and indeed, this would have been consistent with their fiduciary duty.

But in 2018, requirements were introduced for a Statement of Investment Principles under which trustees must *"take account of financially material considerations over an appropriate time horizon, which the trustees should consider when making investment decisions, including Environmental."*[17] Then the Pension Schemes Act 2021 (section 124[18]) put the Paris Agreement on the face of pensions legislation. In other words, fiduciary duty now extends to a 2050 time horizon. Trustees in the UK are now required to understand and manage climate impacts, and climate policy risks, to meet a net-zero target by mid-century. So, if a pension scheme owns an airport, or shares in oil extraction industries, or any other major infrastructure with significant carbon emissions, either directly, or indirectly through a fund, it now needs to review its fiduciary obligations, its holdings, and its future plans.

Conclusions

Infrastructure takes a long time to develop, and climate impacts and mitigations may not adequately have been considered in the development phase. The decision-making framework (both planning and business planning) cannot now ignore carbon emissions. Policy development may not be smooth but targets once set need policy to deliver. Policy is open to challenge in the courts (and policymaking through legal challenge is not a helpful environment within which to develop long-term infrastructure). Policy indicates a higher cost of carbon which needs considering in plans.

While little in the way of infrastructure has been refused consent on climate change grounds to date, that may change. We may end up with situations where proposed infrastructure will get consent, but may not get built, because funders perceive a risk to investors of a future change in policy that may constrain the ability of an infrastructure asset to be used, and thus constrain the return on the project. Sometimes, an asset will get consent and then will get built, but investors risk losing out from changes in policy. Those managing investment now have new obligations under TCFD and under the Pensions Schemes Act and this will in due course impact decisions on infrastructure.

The best way forward for long-term assets is to build in climate risk and mitigations at an early stage and constantly review risks and mitigations. In any case, the collision between climate and infrastructure development is real. Ricardo can help with carbon management, strategy and planning, mitigation option analysis, renewable energy and alternative fuels, electrification of transport and heating, and implementing new technology, and if all else fails, expert witness services.

The author

Mark has worked in energy and climate change for 30 years, nine of these spent at Ricardo. He has supported government policy development as an academic at the University of Oxford and on secondment to government. As a developer, he achieved planning consent for a number of wind and solar farm projects. Mark has appeared as an expert witness at public inquiries in support of local authorities who refused planning on climate change grounds to two airport expansions. He is also working with several airports on strategies to ensure they minimise carbon emissions, as part of proposed submissions for Development Consent Order.

Mark is currently finishing a book called "How Green is your Pension?" which explores how the £6 trillion invested in UK Pension schemes can be invested differently, to minimise risk of stranded assets, and maximise returns in the face of climate change.

Ricardo has nearly 5,000 experts in vehicles, rail, aerospace, energy, carbon emissions, and air and water pollution. To find out more see **www.expertwitness@ricardo.com** or to get in touch **email expertwitness@ricardo.com**

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The Art of Restoration

By Eur Ing Constantinos Franceskides Ph.D.
A critical assessment on the subject of restoration and betterment.

As a forensic engineer, I have been involved in several cases where the recovery and reinstatement of an asset was the "make or break" point in the successful resolution of an insurance claim.

It is not immediately obvious how a forensic engineer might influence the recovery, reinstatement, or restoration of an asset; however, let us start by thinking of a forensic engineer akin to a forensic pathologist. Although this is a gross simplification of the work of a forensic pathologist, they are considered to be the experts in determining medical causes of death and how disease affects the human body. Similarly, forensic engineers identify the root cause of the failure in a system or an individual component. The key difference is the mechanical, rather than biological, aspect of the work. Pathologists look at injuries and offer expert opinion on the nature of the damage and likely causation whilst considering patient history and specifics of the incident. Similarly, forensic engineers will look at the operation, working envelope, and the system as a whole in order to piece together the operative history of the asset.

So how is this connected with the subject of restoration and betterment? We will explore this further at the end.

Restoration, in accordance with the Cambridge Dictionary, is *the act or process of returning something to its earlier good condition or position, or to its owner.* By default, this would be a positive outcome for any affected asset. As you will see, this is not always the case and like most things in the forensic world, detail is everything.

Once the asset is assessed by the engineer, there is the important work of finding the root cause of the failure and establishing the true extent of damage to the system. Once this critical work is completed, the decision to repair or replace is simply an economical equation of cost (material and labour) over benefit. If reconditioning is an appropriate course of action, the engineer is best qualified to recommend the most suitable technology, contractors, and specialists to conduct and oversee the project.

Many contractors, both specialists and generalists, consider themselves qualified to perform restorative work, but restoration on specialist items that are often subject to considerable insurance claims should be limited to a very few experts. Consider the restoration of an 1814 steam-powered envelope folding and embossing press. An engineering marvel of its time, it is full of unknowns and uncertainty for its insurers today. A press of such type might be central to the business and its unique selling point. It is thus a critical component of the business operation and may carry its reputation upon its capabilities.

When an order for embossed and folded envelopes to serve invites for a high-profile wedding was received and the venerable machine was called into action, it promptly failed. The supply of a modern, much more capable machine for the task was simply not an option and neither is a like-for-like replacement. Thus, restoration was the only way forward to allow the order to be fulfilled in the manner intended, which involved disassembly, casting of new materials, balancing of the components, and reassembly of the unit.

What makes this case unique is the bespoke approach required for each component and the care and attention required to restore almost each individual nut and bolt. The resolution of this claim was not possible without a successful restoration. The potential business interruption and significant settlement created additional incentives to complete the restoration at a much lower cost.

3D scanning was used to recreate a failed flywheel, which was then adapted for the new main shaft. A model was then used to create the casting voids. The flywheel was then recast with much higher accuracies. Following the casting, the flywheel was then balanced and machined where needed to remove any secondary vibrations.

A successful restoration is not only measured by the ability to return the unit back to service, but to have the confidence of repeat operation and technical support when required. In this case, there was the curious outcome of a machine manufactured in 1814 returning to service with a 12-month warranty.

Yet careful application of these techniques is required when, at first glance, there appear to be no downsides. The next example demonstrates precisely why.

A fire consumed a paper storage facility where, next door, a collection of valuable and highly collectable vehicles was stored. The vehicles were exposed to the – sometimes invisible – combustion products produced in the fire. This led to a very expensive and complicated insurance claim. At the time, the vehicle expert advised that a superficial clean would suffice to restore the cars to their previous condition. Unsurprisingly, months later, chassis rails, fuel pipes, and body panelling were a few of the items that showed evidence of exaggerated corrosion. The expert then advised a complete strip and restoration of two of the more badly affected vehicles: a very old bread van and an exotic sports car. Both restorations took place with specialists, the latter with the original manufacturer, which left the vehicles in pristine condition. This resulted in an unexpected situation for insurers, with

the bread van losing a significant part of its value with the loss of many original components and the exotic sports car gaining a considerable sum due to the restoration to seemingly original condition by the manufacturer. So, in effect, the same process yielded two very different outcomes, with one demonstrating the insurance principle of betterment. The old bread van was a 1956 Citroen 2CV in its original paintwork and with few defects. An extremely rare find, most of these are repainted; an example with the original paint is instantly an attribute to the price of the vehicle. Many experts would be capable of identifying the root cause of the corrosion, but only the right expert is capable of specifying the correct restoration techniques and fully resolving the issue.

In short, to be able to administer the correct treatment, the expert must have complete confidence in the diagnosis. Like a pathologist, the expert must know which parts are being attacked and understand the effects of treatments available to treat the cause rather than the symptoms. Unlike forensic pathologists, forensic engineers, with the correct application of restoration techniques, can breathe new life into their subjects.

So, what can you expect from us?
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Learning Points:
- Not everything is beyond economic repair
- Not everything is economic to repair
- Balanced expert assessment of the asset and subsequent stages is needed from the outset.

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The UK's Economic Crime Enforcement Gap: the Merits of a New Funding Proposal

by Chris Ladusans, Associate - www.wilmerhale.com/

On 24 January 2022, the anti-corruption campaign group Spotlight on Corruption published a report on the state of economic crime enforcement in the UK (the "Report"). The Report warns that *"the UK is currently losing the fight against economic crime"* because UK national level agencies responsible for enforcing economic crime ("UK Enforcement Agencies") are *"under resourced, over-stretched and out-gunned."*

Its headline proposal for addressing this problem is the creation of an *"economic crime fighting fund"*, which would see the significant funds raised by UK Enforcement Agencies being reinvested on top of their core budgets which are allocated by the Government.

This article considers whether such a fund would help in fighting economic crime or whether simply throwing more money at the problem risks creating unwelcome incentives for UK Enforcement Agencies.

UK enforcement difficulties

UK Enforcement Agencies have shouldered the burden of long-term government cuts. Most agencies have seen their budgets decline in real terms since 2010 and the Report identifies a lack of funding as the key driver of weak enforcement outcomes. The evidence suggests that UK Enforcement Agencies are struggling. The SFO has faced criticism for its limited caseload and prosecution failures caused by disclosure errors and the picture is similar across other UK Enforcement Agencies, with the NCA securing fewer than five prosecutions a year for economic crime offences between 2016 and 2021 and prosecutions for money laundering falling by 35% over the same period.

Economic crime fighting fund – a flawed proposal?

The Report's proposal for the future funding of UK Enforcement Agencies offers, on its face, an attractively simple way forward. However, the solution has two key problems:

1. It connects UK Enforcement Agencies' funding levels with the proceeds they recover through enforcement, for example through deferred prosecution agreements and asset recovery orders. This risks incentivising the agencies to prioritise the most lucrative cases (i.e., targeting the companies with the deepest pockets), and favour the most financially advantageous resolutions above the less lucrative alternatives.

2. It gives the impression that money alone is the solution. The UK Enforcement Agencies' failures, however, cannot solely be left at the door of underfunding. In support of this proposition are recent comments made by the Director of the SFO, highlighting that the *"focus on financial resources is over-simplistic"* and that *"our relatively modest budget doesn't prevent us from delivering"*. Culture, leadership and training all have an important role to play in making UK Enforcement Agencies effective and helping them to attract and retain talent. Before committing to any new funding, clear proposals are required to explain how further investment would be targeted to solve existing problems.

Conclusion

The Report paints an effective picture of UK Enforcement Agencies in crisis. However, simply funneling more money into the current system may not prove to be a panacea, were it even to be possible. Instead of expending energy creating a new funding mechanism, greater consideration needs to be given to how any new investment is better utilised to provide the most value for money for taxpayers, in the hope that any resolution decisions are reached in a manner that is driven by the interests of justice and not UK Enforcement Agencies' balance sheets.

Early Settlement Offers - Can They Ever Be Advantageous?

by Katherine Browne
www.anthonygold.co.uk

One of my primary objectives when acting for clients is to ensure that they are compensated properly for the injuries they sustain.

For this reason, it is not ideal when insurers make very early offers of settlement, especially in cases of substantial value. If an offer is made before medical evidence is complete, a solicitor must advise a client on a "best guess" scenario – will the compensation that is offered be enough to compensate that client for any ongoing pain or lasting complications from their injuries, and will it cover all necessary treatment and care costs going forward?

However, in some limited circumstances, an early offer of settlement can be of benefit to a claimant.

My client Mrs M was a passenger in a car being driven by her husband on a country road. Another driver tried to overtake the car on approaching a hill. There was no clear line of vision. An oncoming horsebox came into sight and, to avoid colliding with the horsebox, the other vehicle drove into the side of Mrs M's car. The force of the action sheared off the back wheel and axle and the car careered into the bank. Very sadly the other driver was killed in the collision.

My client who was 90 at the time suffered significant injuries including a fractured skull and spinal fractures throughout her upper and mid spine. She was in hospital for 3 weeks. She developed BVVP (a form of vertigo).

The insurers agreed to fund an Immediate Needs Assessment (INA) under the Rehabilitation Code 2015. This enabled me to instruct an independent case manager to visit my client and prepare a report making recommendations for rehabilitation to support my client in her recovery.

The INA report gave some costings for the initial recommended rehabilitation, (so for example it recommended initial assessments with a pain management specialist, neurologist, neuro-physiotherapist and psychologist). It also gave some recommendations for the initial care support my client would require in her recovery.

On disclosure of the report, the insurers made an early offer to settle the claim for £75,000.

An INA is designed to support a claimant in their recovery, not to enable the claim to be valued. The usual progression of a personal injury claim is that, when a client has made some recovery from their injuries (hopefully with some extensive rehabilitation funded by the insurers), they are seen by various independent medical experts who prepare reports which give an opinion and prognosis for the injuries sustained. Those reports enable a solicitor to value the claim.

At such an early stage in Mrs M's claim, I was unable to advise her with any certainty that the offer would be enough to compensate her fully. We simply didn't know how fully she would recover from her injuries and what investigations, treatment and support she may require long term.

However, Mrs M was 90 at the time of the accident, and sadly her husband had recently been diagnosed with terminal cancer. Whilst there was a risk that she would be undercompensated for her injuries by accepting this offer, given that it would bring her claim to a swift conclusion (and we had the INA for her to follow up with any recommendations made for her treatment using the compensation she received), she was keen to explore early settlement.

Following negotiations with the insurers, I was able to secure a six-figure settlement for my client which she was happy to accept.

The New Commercial Court Guide: What Litigators Need to Know

by John Kimbell QC, Thomas Macey-Dare QC, Nicola Allsop, Turlough Stone and Maya Chilaeva at Quadrant Chambers

Overview

The 11th edition of the Commercial Court Guide was published on 9 February 2022. This is the first revision since the 10th edition, which was published in 2017 to coincide with the introduction of the Business and Property Courts. This article accompanies a webinar which can be found here. *

This article explores the key themes in the Guide, before summarising the main changes in the following areas: (1) case management, (2) disclosure, (3) junior advocacy, (4) applications, (5) arbitration appeals, (6) expert evidence as to foreign law, (7) witness statements, (8) trials, and (9) negotiated dispute resolution.

Introduction and key themes

The new Guide, while retaining the status, structure and much of the content of the previous version, contains some significant changes. Some of these changes reflect important developments in Commercial Court practice that have taken place in the 5 years since the last edition, including the introduction of the Shorter Trials and Flexible Trials schemes (Practice Direction 57 AB), the disclosure pilot (Practice Direction 51 U), the new regime for trial witness statements (Practice Direction 57 AC) and, of course, the effects of the Covid pandemic, which has accelerated the move towards remote hearings and paperless trials.

More broadly, the new Guide signals an important shift in the way the judges want litigation to be conducted in the Commercial Court. That shift is itself designed to further the goals of the Woolf Reforms, encapsulated in the Overriding Objective in CPR Part 1, of dealing with cases justly and at proportionate cost, which involves managing cases in ways which save expense, are proportionate to their value, importance and complexity; ensure that they are dealt with expeditiously and fairly; and allot them an appropriate share of the court's finite resources. A number of the changes in new Guide discussed in this article, are designed to better achieve these aims by encouraging the Court, with the parties' assistance, to manage cases in more considered, bespoke, flexible ways which avoid one-size-fits-all solutions and box-ticking exercises.

One striking feature of the new Guide is that, in a number of areas, it marks a return to the old ways, and reimposes boundaries that have become blurred in recent decades. This is not procedural purism for its own sake, but reflects the judges' experience of what makes for good case management in the Commercial Court. This trend can be seen most clearly in three areas:

(i) Statements of case: The new Guide re-emphasises that pleadings should not contain general introductions or argument, but should be confined to primary allegations – now defined to mean "only those factual allegations which are necessary to establish the cause of action, defence or point of reply being advanced" – and particulars of those allegations.

(ii) Trial witness statements: The detailed guidance about trial witness statements in the previous edition of the Guide has been jettisoned in favour of a straightforward provision that parties must comply with Practice Direction 57AC, which contains rules to ensure that statements only contain the evidence in chief that the witness of fact would have given orally, normally in their own words, and to prevent them from being used as written advocacy by the lawyers to narrate the documents or argue the case.

(iii) The trial itself: The Guide seeks to solve the old problem of how to ensure that the trial judge reads the documents in the case properly, without narrating them in writing in the witness statements or in massively expanded skeleton arguments, and without introducing them for the first time in cross-examination, by reviving the old, long-form, oral opening. Alongside this change, it also introduces new regimes for trial listing and judge's reading time, and a new Agreed Factual Narrative document, which will contain much of the uncontroversial material that would otherwise be contained in witness statements and skeleton arguments. These and other important changes to trial practice and procedure are examined more closely later in this article.

(1) Case management

The following three themes underpin the "new approach" to case management in the new Guide: (1) judicial "activism"; (2) the more efficient use of limited judicial resources; (3) the need to consider carefully, from an early stage and throughout proceedings, what reasonable steps will be sufficient for a fair trial of the case. Overall, there is a move away from a "one-size-fits-all" approach to case management to a more bespoke one.

An example of the first theme is that the Court aims to "triage" all claims of its own motion prior to the CMC, to consider whether it is suitable for transfer out to the London Circuit Commercial Court or one of the Circuit Commercial Courts. If the case is not transferred out then it may be transferred out later at the CMC (see B13.5 and the guidance in Appendix 14).

The second theme is apparent from, amongst other matters: (i) the updated Case Management Information Sheet (see D7.4 and Appendix 2); (ii) new rules on the provision of draft directions (see D7.8); (iii) the new checklist for applications for service out of the jurisdiction (see Appendix 9); and (iv) the new approach to time estimates. As to the latter, there is now to be a "block" estimate, inclusive of pre-reading, and the trial estimate needs to take account of the time likely to be required for the judge to read the parties' written closing argument before oral closings (see F.5). (see more detail below under the heading "Trials").

The third theme is exemplified by the fact that advice on evidence is encouraged at an early stage (see C6.1) and there is an ongoing obligation upon the parties to give careful consideration to how they will prove their case/refute their opponents' case (see E5.1 and E5.2). It also informs – and is expressly tied into – statements of case. The key changes here are: (i) a renewed emphasis that only "primary allegations" – i.e. the essential elements of a cause of action – should be pleaded, and that evidence and background information should not be pleaded (see C1.1); and (ii) the page limit before permission is required has been increased from 25 to 40 pages (but the ambition should be not more than 25 pages) (see C1.2).

(2) Disclosure

The emphasis is on cooperation between the parties and avoiding disclosure looming too large as an issue, thus wasting court time and ratcheting up costs.

The key changes to disclosure are as follows:

1. There is an express emphasis on the need to limit disclosure to that which is necessary to deal with the case justly (see E1.1).

2. To that end, the Disclosure Review Document ("DRD") should be kept simple and concise (in particular the List of Issues for Disclosure). The Court may disallow the costs of overly-long and complex DRDs (see E2.2).

3. Parties should give careful consideration in every case, whatever its financial value or general complexity, to whether it may properly be treated as a "Less Complex Claim" for the purpose of disclosure so as to be dealt with pursuant to Appendices 5, 6 and 7 of PD51U (see E2.6).

4. Parties are obliged to cooperate: PD51U §3.2; they should not allow the settling of the DRD to become contentious, time-consuming, or expensive (see E2.6).

5. In achieving that goal, the use of multiple disclosure models is discouraged (see E2.2).

6. The Court now expects to approve the DRD in no more than 1 hour within the first CMC (see E2.7).

(3) Junior advocacy

The new Guide encourages junior barristers to take advocacy work in led cases, particularly at case management and costs hearings:

1. See for example encouragement of junior advocacy at D7.1, E1.4 and J13.3.

2. The Guide also makes clear that where a party has retained more than one advocate (e.g. leading and junior counsel), there is no requirement that all attend. Rather, juniors are encouraged to attend because they are often well placed to assist the Court.

This approach is consistent with the Court's commitment to improving the quality of oral advocacy at the Commercial Bar.

(4) Applications

There are three key changes in the Guide in relation to application hearings:

1.Time estimates for different types of applications have been revised (see F5.5).

2. The Guide reiterates that parties should not be arguing interim applications in their witness statements (see F8.2).

3. The Guide states that where heavy interlocutory applications are likely to involve expert evidence, this should be brought that to the Court's attention as soon as possible so that it can be appropriately managed (see F8.6).

Note also that the deadlines for providing application bundles and skeleton arguments to the Listing Office have changed. They must be provided by 12pm (and not 1pm as was the case previously) (see F6.4, F6.5 and J6.2).

(5) Arbitration appeals

The Commercial Court has always been discerning before it allows a challenge to an arbitration award to go forward. Consistently with that approach:

1. The new Guide contains a reminder about the limited parameters of s.67 and s.68 challenges (see O8.3 and 8.4).

2. The summary dismissal process has been extended to s.67 appeals (see O8.6).

If an appeal is knocked out summarily, the applicant does have a right to apply to the Court to set aside the order and seek directions for the hearing of the application. Note however that if such an application is made and dismissed after a hearing, the Court may award costs on an indemnity basis (see O8.7).

(6) Expert evidence as to foreign Law

It should be noted at the outset, that the law has not changed: the content of foreign law remains a matter of fact which must be proved. However, how it is proved is a matter of procedure and this must be approached with fresh eyes. It will not be necessary in every case for formal expert reports to be exchanged.

The new provisions at H3 of the Guide reinforce two themes, (i) a bespoke approach to commercial litigation; (ii) the need for the parties to co-operate from the outset and certainly in advance of the CMC.

Key changes to expert evidence as to foreign law are as follows:

1. There are a various alternative options to formal expert evidence, including (i) expert evidence being limited to the identification of the relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources, with

advocates making submissions at trial with reference to those sources and (ii) the Court taking judicial notice, or accepting the agreement of the parties as to the nature and importance of sources of foreign law, again with trial advocates making submissions at trial (H3.3). The approach here will be informed, in part, by whether the foreign law in question is that of a civil or, common law country. In the case of the latter, the Court is less likely to need the assistance of detailed, formal expert evidence (H3.4(d)).

2. Where a party has already retained a foreign lawyer, it may not be necessary to instruct a separate foreign law expert to provide expert evidence (H3.5).

3. Where oral evidence of foreign law has previously been directed, consideration should be given at the PTR (if there is one) as to whether oral evidence is still reasonably required (H3.7).

(7) Witness statements

The Guide has been updated to include a reference to the new Practice Direction on Trial Witness Statements at PD 57AC (H1.1). Reference now needs to be made to that PD to ensure the contents of trial witness statements are compliant.

The Court is likely to be more open to evidence being given remotely. The Guide expressly provides that video link evidence should always be at least considered for a witness who will have to travel a substantial distance, including from abroad and whose evidence is expected to last no more than half a day (H4.1)

(8) Trials

The important changes can be summarised as follows:

1. An agreed detailed narrative may be required, setting out the uncontentious, relevant facts, chronologically, or in a logical structure of chapters, with each chapter to be chronological. There is encouragement in the Guide to make this as full as possible and perhaps, an overly optimistic statement that the process of agreeing the document should not become a substantial additional burden, or involve argument over whether the content should be treated as agreed (J6.5). The hope is that the agreed detailed narrative will include the lowest common denominator in terms of agreement between the parties, leaving skeletons to focus on the contentious facts and the law.

2. Trials will be listed in a block and will include pre-reading, so that the first day of the trial is the day on which pre-reading commences (J3.3). However, pre-reading will not always take place in one isolated chunk: the Court may decide to pre-read for a period, followed by opening submissions, followed by further pre-reading (J8.3).

3. The deadline for skeletons is now 12pm, rather than 1pm (J6.2).

4. Parties and legal representatives shall minimise the use of paper at trial. The default is no hard copy bundles (J2.2).

5. A return to more traditional openings, to be used to introduce the trial Judge to the important documents. The Guide contains a warning that cross-examination is not the time to introduce the judge to the significant documents (J8.1)

(9) Negotiated Dispute Resolution

Alternative Dispute Resolution (ADR) has been re-named, "Negotiated Dispute Resolution" or "NDR" (Section G and Appendix 3). This change is intended to reflect that "NDR" is no longer to be viewed as an alternative, discrete exercise, but is to exist alongside litigation, throughout the life of a case. It is not clear from the Guide whether and how NDR will differ from ADR, but parties can expect more engagement with the Court, presumably at the CMC, as to their appetite for settling and the best way to go about exploring settlement.

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* www.quadrantchambers.com/media/new-commercial-court-guide-what-litigators-need-know

Freedom of Speech and Fitness to Practise: Tribunals Must Apply a Higher Test Before Restricting Speech

Vanessa Reid *considers a recent High Court decision relating to interim conditions preventing a doctor from using social media to share any views whatsoever relating to the Covid-19 pandemic. The decision makes clear that fitness to practice tribunals must look more closely at the ultimate merits of a case before imposing restrictions on a registrant's freedom of expression.*

Introduction

The recent High Court decision in *Dr Samuel White v General Medical Council* [2021] EWHC 3286 has clarified the approach that professional disciplinary tribunals must take when considering restraints on a registrant's freedom of expression at the interim order stage.

The decision makes clear that interim order tribunals must apply the test set out in section 12(3) of the Human Rights Act 1998, which establishes that a court should not restrain publication prior to final determination of the issues in a case unless it is satisfied that it is "more likely than not" that it will be established at the final hearing that publication should not be allowed. This necessarily requires an examination of the substantive merits of the case and is therefore in tension with the standard guidance on imposing interim orders, which emphasises that interim order tribunals typically do not make findings of fact or resolve disputes of fact.

This decision is particularly significant in light of the increasing number of professional discipline cases addressing speech related to the Coronavirus pandemic and its attendant controversies, as well as the general increase in scrutiny of the use of social media by registered professionals.

Background

The allegations against Dr White related to a video he posted on YouTube expressing his views about Covid-19 policies and practices. In the video, Dr White complained that doctors and nurses were being prevented from providing effective treatments for Covid-19, naming hydrochloroquine, budesonide inhalers, and ivermectin as "safe and proven treatments" that he had been prevented from offering to patients. These are controversial treatments for Covid-19 and their efficacy has not been widely accepted in the medical profession.

Dr White went on to question the safety of the Covid-19 vaccine and the need to have it. He raised concerns about PCR testing for Covid-19, claiming that the false positive rate was greater than 90%. One of his final claims was that "masks do absolutely nothing."

In response to the publication of this video, the General Medical Council ("GMC") commenced proceedings against Dr White and referred him to the Interim Orders Tribunal ("IOT") for it to consider restrictions on his medical practice under section 41A(1) of the Medical Act 1983.

The GMC alleged that Dr White had spread misinformation and inaccurate details about Covid-19 and how it is diagnosed and treated, including that the vaccine is a form of genetic manipulation which can cause serious illness and death and that patients should not wear masks. The GMC alleged that by disseminating this misinformation Dr White had potentially put patients at risk and diminished the public's trust in the medical professional.

Interim order tribunal proccedings

At the IOT hearing, the GMC submitted that conditions on Dr White's registration were necessary but made no submissions as to what specific conditions were appropriate. The GMC stated that the issue would be whether Dr White's communications fell within the bounds of legitimate freedom of speech protected by Article 10 of the European Convention on Human Rights ("ECHR") or whether it went beyond "legitimate medical comment to conspiracy theories."

Dr White prepared a lengthy witness statement disputing the GMC's allegations and standing by the substantive claims made in his YouTube video. He produced an extensive volume of literature and scientific and medical opinions which he contended supported his opinions. Dr White's representative made submissions in relation to ECHR Article 10 and the potential infringement of the right to freedom of expression that was at stake.

At the end of the hearing, the Chair of the IOT set out the approach she and her colleagues were proposing to take, making reference to the ordinary guidance and procedures for considering applications under section 41A.

The IOT concluded that in all the circumstances there was information to suggest that Dr White might pose a real risk to public safety if he were permitted to remain in unrestricted practice, given the nature of

the concerns raised, and that public confidence in the profession might be seriously undermined in light of the public nature of the alleged misinformation posted by Dr White. The IOT noted that it had considered the submissions made in relation to Dr White's right to freedom of expression, but that it "considers that Dr White's manner of expressing his own views to the general public may have a real impact on patient safety."

The IOT therefore imposed an 18-month interim order of conditions of practice which included the following conditions:

4. He must not use social media to put forward or share any views about the Covid-19 pandemic and its associated aspects.

5. He must seek to remove any social media posts he has been responsible for or has shared relating to his views of the Covid-19 pandemic and its associated aspects.

Relevant law: Freedom of expression

Article 10 of the ECHR

Article 10 of the ECHR provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…"

Article 10 is a qualified right, subject to conditions and restrictions as prescribed by law where necessary to further the legitimate aims of a democratic society. Two of the qualifications specifically identified within article 10(2) are the aims of pursuing public safety and the protection of health. The right to freedom of expression is therefore not absolute, but subject to the limits of proportionality.

Section 12 of the HRA 1998

Section 12 of the Human Rights Act 1998 applies where a court is considering whether to grant any relief which, if granted, might affect the exercise of the right to freedom of expression under the ECHR. Section 12(3) states that: "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

Lord Mance set out the approach to section 12 in paragraph 19 of PJS v News Group Newspapers Limited [2016] UKSC 26 judgment: "[T]he general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court that he will probably ('more likely than not') succeed at the trial."

High court proccedings

Dr White challenged the IOT's decision on a number of grounds. The High Court decision, delivered by Dove J, focused on Dr White's arguments that in reaching their conclusion the IOT failed to afford sufficient respect to the claimant's right to freedom of expression under Article 10 and failed to have adequate regard to the high test to be satisfied before such restrictions could be imposed.

It was not disputed that section 12 of the 1998 Act was applicable to proceedings in the IOT, that section 12(3) applies to any application for prior restraint of any form of communication that falls within Article 10, or that the IOT had imposed conditions which restrained Dr White's ability to express his views before trial. The High Court found that section 12(3) of the 1998 Act was therefore engaged, although this specific statutory provision had not been raised by either of the parties.

The High Court found that it was clear that the IOT did not direct themselves to the test required by section 12(3). There was no reference anywhere in the IOT decision to section 12 and the IOT were not directed in relation to this statutory provision. It was evident from both the observations of the chair during the hearing and the subsequent written determination that the IOT had approached this case on a "conventional" assessment of the balance of risk and proportionality.

As Dove J noted, this was perhaps unsurprising, as there is no reference in the IOT Guidance to the approach to be taken where there is an application to impose conditions preventing a medical practitioner from exercising his right to freedom of expression. The Guidance in fact expressly states that "the IOT does not make findings of fact or resolve disputes of fact."

Dove J rejected the GMC's submissions that the assessment made by the IOT was effectively the equivalent of the test under section 12(3) or, alternatively, that the findings made by the IOT would satisfy the test. He noted that section 12(3) requires a specific enquiry into the merits of the case, which the IOT expressly did not undertake.

The High Court found that the failure to allude to section 12 or apply the test which it requires was clearly wrong and could not stand. Dove J emphasised that the IOT decision was wrong from a purely procedural perspective and that the decision had no bearing whatsoever on the substantive merits of the parties' competing positions.

As a final observation, Dove J noted that there were potentially troubling aspects of the nature of the challenged conditions that might offend the proportionality principle. In particular, condition 4 as it was drafted by the Panel would have prevented Dr White from expressing even conventional views about the pandemic, including views which the GMC supported. Dove J noted that "any condition proposing to curtail freedom of expression on an interim footing, in order to be proportionate, is likely to need to be specific as to what views or opinions the person subject to the order is precluded from expressing."

Conclusion

The immediate consequence of the High Court's decision in *White v GMC* is that interim order tribunals considering prior restraint of a registrant's freedom of expression will need to consider the merits of the substantive allegations in order to determine whether it is "more likely than not" that it will be established at the final hearing that the speech should be prohibited. This is a significant departure from the standard procedure for interim order tribunals, which ordinarily do not make findings of fact or resolve disputes of fact.

Some ambiguity remains regarding what, exactly, will need to be established at the interim order stage in order to meet this test. Restrictions on speech as a temporary condition of registration are one of many possible sanctions which a tribunal may impose at the end of fitness to practise proceedings, and will depend on their findings regarding the Registrant's impairment at that time, among other considerations. It is not within the powers of a fitness to practise tribunal to impose a permanent ban on publication, and any conditions restricting speech will be tied to registration status. This is in contrast to, for example, a civil action for an injunction prohibiting speech, in which the central issue to be determined at trial is whether publication should be prohibited. In addition, interim order applications are often made at an early stage of proceedings before full evidence is available.

Further difficulty arises in the context of restricting speech relating to Covid-19 controversies, which clearly divide some members of the profession, but undeniably have the potential to bring the medical profession into disrepute and to increase the risk to patients who are exposed to misinformation. Where an allegation of disseminating misinformation has been made, it will be incumbent on a regulator to adduce medical and scientific evidence which is capable of establishing which information is correct and which amounts to misinformation.

This case illustrates yet more ways in which both the Covid-19 pandemic and the rise of social media are shaping the development of law and creating new and difficult considerations for regulatory practice. Regulators, tribunals, and practitioners alike will have to remain flexible and continue to adapt to the changing landscape.

Practical tips for practitioners

- The test to be applied in cases where an interim restriction on speech is sought is whether it is "more likely than not" that the regulator will succeed in establishing at the final hearing that the speech should be prohibited.
- At interim order hearings in which restrictions on speech are at issue, both regulators and registrants will need to be prepared to make robust submissions regarding the ultimate merits of every stage of the case, including submissions on the likely sanctions to be imposed at the conclusion of fitness to practise proceedings.
- Any condition restricting speech must be specific and narrowly tailored in order to comply with the proportionality requirement of the ECHR.
- Regulators should consider making submissions regarding the specific conditions said to be necessary at the interim order stage rather than leaving the formulation of conditions to the tribunal.

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Contempt of Court

Syed Rahman of Rahman Ravelli considers three cases that illustrate the degree of discretion available to courts when dealing with contempt of court allegations.
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A trio of recent cases has demonstrated how courts can take a compassionate, reasoned approach to dealing with allegations of contempt of court, using the discretion that is available to them.

Dattani V Rasheed

In *Dattani v Rasheed [2022] 3 WLUK 49*, the court permitted a suspended suspension to be delayed pending compliance with a previous order. The claimants were judgement creditors of the first defendant for a sum in excess of £2 million. They obtained a charging order over his share of a property which he joint beneficially-owned with his wife. After the property was sold, the court made an order which was endorsed with a penal notice:

a. prohibiting the defendants from disposing of half of the proceeds of sale;

b. requiring them to provide to the claimants all information within their possession regarding one half of the net proceeds, along with what happened to, and the location of, those proceeds; and

c. to prepare a witness statement or affidavit providing the above information.

The claimants alleged that the first defendant failed to comply with that order and applied for his committal for contempt of court. The application was heard in the first defendant's absence. The first defendant was found to be in contempt of court, and he was sentenced to two months' imprisonment suspended for one year. Such suspension was conditional on the defendant complying within 30 days of the order. If he did not comply, then the sentence of imprisonment would take effect immediately.

The defendant provided a statement. However, given that the statement did not have a statement of truth, nor did it give full information about the amount or location of payments that had been made with the sale proceeds, the claimants alleged again that he had not complied with the order.

The burden of proof was on the claimants to prove that the defendant had not complied to the criminal standard of proof. The defendant had been unable to access his bank statements and, therefore, had provided all the information that was known to him at the time. Therefore, he had complied with the first limb. However, he had not provided details of payments made or their location from the proceeds. As such, the prison sentence came into immediate effect.

The claimants were also granted an order under the Bankers' Books Evidence Act 1879, requiring the first defendant's bank to produce his statements. The defendant claimed he had not been able to access his bank statements and was unaware that his statement needed a statement of truth. He also stated that he was in poor health and produced medical records, including a fast-track cancer referral and MRI scan.

The judge stated that it was possible to vary the order to allow him one last opportunity to comply with the outstanding obligations. On balance, there were three reasons why the order should be varied:

1. The medical evidence provided by the defendant;

2. The bank statements were now available and the defendant was able to provide the missing information; and

3. The claimants were seeking a form of authority authorising his bank to give them details of cash withdrawals of over £1,000, which would assist in verifying the missing details.

The order was additionally varied to include further conditions, namely that the new witness statement contain a statement of truth and the first defendant sign the form of authority.

Mitigation

This case demonstrates the court's ability to use its discretion and its willingness to take into account the mitigation in order to resolve the situation sensibly and with compassion. Similarly, the court exercised some compassion in Eim v Lewis (also known as DRFG Invest II sro v Shire Warwick Lewis Capital Ltd), where an accountant who had deliberately transferred assets subject to a freezing order had his sentence reduced from nine months to five months. This reduction was made on the basis that most of the assets had been recovered and with regard to the impact that imprisonment would have on the accountant's career and his dependants.

GUH v KYT is another example of the courts taking a rounded approach to contempt of court. The defendant had breached a court order to not contact the claimant and had made threats to disclose private information. The fact that the threats had not been carried out and that no irretrievable damage had been done was taken into account by the judge - as was the fact that some of the action had taken place before the defendant had received legal advice. As such, it was not clear whether the defendant understood the

gravity of her actions. Since receiving legal advice, she had apologised for her actions and complied with the orders. It was found that the finding of contempt was sufficient and that no further sanction was imposed. But the court did confirm that if there was any future breach, the defendant would face an immediate sentence.

Conclusion

These three cases indicate that courts are using their discretion to find a resolution to the core issues at hand and dealing with cases with compassion where mitigation is appropriate. They are indicators of how courts take a wide, holistic view of a case and the facts when applying discretion. This is welcome proof that there is a place for mitigation in proceedings where there are clear grounds for it.

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Two Expert Roles - Expert Advisor and Expert Witness

by Clive Holloway, Senior Director, Construction Solutions
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Introduction
Disputes and confrontations frequently arise on construction and engineering projects around the world, that are often resolved through formal arbitration and/or litigation proceedings. In such circumstances, Expert Witnesses of various disciplines may be appointed to address technical issues, provide expert opinion and to generally assist the tribunal or court on matters that are within his or her field of expertise.

Commonly however, Expert Witnesses are not appointed until late in the dispute resolution process, in line with the procedural timetable (and usually when the hearing is looming on the horizon) to review statements of claim and defence, factual witness statements, and to prepare an independent and impartial Expert Report on the matters on which he or she has been instructed.

Rather than leaving the appointment of experts until the tribunal or court decides what expert evidence is required and to be adduced, the parties involved in the dispute (claimant and defendant) should consider appointing Expert Advisors at an early stage in the development of a claim or in the preparation of a defence (and possibly a counter-claim). Often Expert Advisors are referred to as 'dirty' experts because they are perceived as not being independent and impartial.

It is however possible in my opinion for both the role of 'Advisor' and 'Witness' to be performed by the same Expert, so the familiarity with and understanding of the issues in dispute can be transferred from one role to the other, but only where the Expert's independence, impartiality and duty to the tribunal, under the Expert Witness role, is not compromised.

Strict caution must be exercised to ensure that all correspondence and communications with the Expert Advisor are channelled through the appointing party's legal team with appropriate wording such as, 'Confidential and Subject to Legal Professional Privilege' in order to preserve the legal privilege of all such communications. However, even by adding this type of wording, such communications may not be eligible to be privileged. Therefore, if that is the case then, when the role switch occurs, e.g. from an Expert Advisor role dealing with claims and disputes in general, to an Expert Witness role in a formal process, then this would need to be fully disclosed. Failure to do so could undermine the independence of the Expert Witness, and the weight given to the evidence provided by the Expert Witness.

Therefore, if it is not possible to readily convert from the role of Expert Advisor to Expert Witness, the Expert Advisor can convey his or her accumulated knowledge, and pass on any analysis undertaken and his or her working documents, to the Expert Witness who is ultimately appointed.

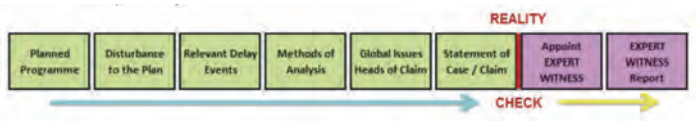
For this article, by way of example, I have assumed the role of Programme Delay Expert Advisor/Expert Witness.

Early Expert Guidance
The early involvement of an Expert Advisor, at the time when the project starts to encounter difficulties, offers significant benefits to the appointing party since it affords the claimant or defendant: a more practical understanding of:

- the project and the scope of work;
- the baseline programme and the as-planned intentions;
- the as-built programme of what actually happened;
- the effect and impact of events, and the extent of delay and/or disruption;
- the causes of the delay and the criticality of the delay;
- the notices of delay with reference to the relevant clauses;
- the detailed particularisation required to support the claims and allegations.

It is essential to establish a sound basis from which to develop credible claims, or to defend claims, for delay and/or disruption, particularly where costs, for prolongation, disruption and other time-related loss and expense are sought in addition to extension of time (EOT) entitlement. In addition, delay to non-critical activities also needs to be identified and understood, not for EOT, but for costs.

Late Expert Representation
When an Expert Witness is appointed late in the dispute process, the delays on the project will have already been prospectively and retrospectively analysed and so the effect and impact of the relevant delay events will already have been determined and the claims (for delay, disruption, costs, loss and expense) and the relevant defences will have already been developed and submitted. Often, by this stage, the parties have already established their entrenched respective positions.



The expectation of the appointing party is often that the Expert Witness will not only be able to support the statement of claim or defence as presented and submitted but, will also adopt a position that favours his or her Client. More often than not however, having been appointed at this late stage the Expert Witness, upon review of the pleaded claim or defence, has to deliver the bad news that the position adopted by his or her Client is unsupportable.

This late impartial reality check, particularly when on the claimant's side, often leads to a lowering of the claimant's aspirations, and is never welcome. On the rare occasion, the pleaded claim or defence is sufficiently credible to be adopted and supported by the Expert Witness. However, in my experience, this is more likely to occur on the defendant's side.

Some unscrupulous (or uninformed) Expert Witnesses (often referred to as 'hired guns') may be willing to adopt and support cases that are exaggerated or inflated and which may be biased in favour of his or her Client, despite the case as presented being unsupportable with very little chance of success and a high risk of failure.

Expert Advisor Role

The engagement of an Expert Advisor early in the dispute process to impartially examine the issues on the project and the positions of the parties before formal claims progress too far, is likely to be advantageous and cost-effective in the long run.

Early engagement of an Expert Advisor is likely to assist parties in a number of ways. One particularly beneficial exercise, in my experience, is the provision of a realistic preliminary indication of the likely range of EOT outcomes, rating the potential success of each delay event. Based on the assessed strengths and weaknesses of the parties' positions, the Expert Advisor will be able to produce a risk assessment matrix, almost like an 'early warning' of any potential vulnerability or exposure. The early engagement of an Expert Advisor, is also likely to provide additional benefits including improvement of relationships, ensuring key issues are addressed as they arise, provide an ongoing dialogue, and ensure consistency of approach.

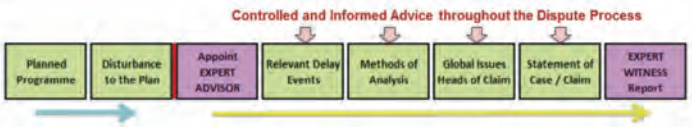
Aim 'Big and High' Tactics

Claimants are usually intent on maximising their claims, based on the mind-set that, on average, they aim to secure approximately 50% of what they claim, with the rationale seemingly being, the higher the claim the greater the potential return. In my experience there is some appeal to clients in this approach, and some claimants have had a degree of success in adopting this tactic. It is therefore not uncommon for an Expert Witness, when acting for the claimant, to be faced with exaggerated and inflated positions which are both unrealistic and unsustainable. It should however be part of the Expert's role in the early stages of appointment to manage his or her client's expectations, which may involve significant reductions in the sums claimed to present a more realistic and sustainable claim going forward.

Hopefully, the Expert Advisor will be able to address this tactic early on and so prevent the proliferation of inflated claims. Often the point will need to be made to a claimant that it is both futile and inefficient to prepare exaggerated and unsupportable claims, which are likely to involve significant time and expense to produce but which are not credible and will inevitably fail in the fullness of time.

Credible Cases

It is advisable for a claimant to engage a credible and experienced Expert Advisor early on, to explain the futility of developing overstated and unsupportable claims, which only antagonise defendants, and create further confrontation. This early engagement would also likely improve the chances of the Expert Advisor securing an appointment to act as his or her client's independent Expert Witness in the formal dispute resolution proceedings.



Defendants, in seeking to prepare credible and persuasive defence are also likely to need the skills of an experienced Expert Advisor to objectively guide them to a fair and reasonable assessment and evaluation of the claimant's case.

From my experience, defendants generally wish to establish their potential exposure to the claims presented by the claimant. I have often been asked 'where do we stand' or 'what's the bottom line' or 'what is the claim really worth' with defendants wanting to establish at an early stage which parts (if any) of the claim(s) they are responsible for. I have also been requested to provide an objective view on what would be reasonable entitlement and compensation, given the circumstances and what would be the expected outcome or likely settlement, taking into account the strengths and weaknesses of the cases put forward by both parties.

Personally, I consider, an Expert Advisor often has an easier task when engaged by the defendant and more readily can progress to being appointed as the defendant's Expert Witness, often adopting and supporting the statement of defence in the process.

Conclusion/Opinion

It is my experience that many claims end up going to a formal hearing before an arbitral tribunal or in court because Expert Witnesses, rather than being impartial and independent, 'tow the party line' and make no legitimate attempt at a 'reality check' by removing the excesses in the quantification of inflated, overstated and exaggerated claims which may ultimately assist in narrowing the issues, reducing the differences between the parties and promoting a settlement.

The use of a credible Expert Advisor early on in the dispute process, particularly on the claimant's side, would guide the dispute process and help produce credible claims, which allow the parties a better chance of negotiating a mutually acceptable commercial settlement, by being realistic, and so avoid a lengthy and potentially costly formal dispute.

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Government Consultation on Fixed Recoverable Costs in Lower Value Clinical Negligence Claims

The government has launched a consultation calling for comments on its plans to limit the legal fees (costs) that injured patients' lawyers can recover from negligent healthcare organisations in successful claims where the patient's compensation is less than £25,000. The proposed 'fixed recoverable costs' (FRC) scheme also proposes changes to the procedure for making low value medical negligence claims.

The government believes the proposed scheme will:

- speed up the procedure for making such claims;
- keep lower value claims out of court;
- reduce the overall cost.

Which claims will be affected by the government's proposed changes?

The proposed FRC scheme will be mandatory for clinical negligence claims where:

- the patient's (or claimant's) compensation is between £1,000 and £25,000;
- the claim arises from NHS, not-for-profit or private healthcare;
- the patient's healthcare took place in England or Wales.

The proposed FRC scheme will not apply to:

- cases where the claimant's compensation exceeds £25,000;
- specified exceptions, such as:
  - claims arising from stillbirth;
  - claims arising from neonatal (newborn baby) death;
- specified cases involving additional complexity, such as:
  - where more than two liability experts are required;
  - where the patient's claim is against more than one healthcare provider, so there are multiple defendants;
  - where the defendant says the patient is out of time for making their claim and raises a 'limitation defence'.

Claims arising from the fatal injury or death of a patient are included in the FRC scheme, as long as they meet the other criteria.

How will the procedure change for making a lower value clinical negligence claim under the FRC scheme?

Key changes proposed by the FRC scheme consultation include:

- claims to be assigned to a 'light' or 'standard' track depending on their complexity and whether the healthcare defendant accepts full or partial responsibility (liability) for the patient's injury from the outset;
- early disclosure of (only) the patient's medical expert evidence and valuation of the claim;
- deadlines for both parties to comply with all stages of the process, with sanctions against those who fail to comply;
- two mandatory alternative dispute resolution stages to encourage agreement:
  - a 'stocktake' meeting between parties;
  - evaluation by an independent barrister, who gives an assessment of the strengths and weaknesses of the claim to both parties, and recommends

whether or how much compensation should be paid.

If agreement cannot be reached within the FRC process, there is nothing to prevent patients from pursuing their claim through the courts. However, there are financial risks for those who reject a proposed settlement under the scheme and take the case to court.

The proposed scheme does not affect the amount of compensation that a patient claimant can receive for their case, if successful.

Who will pay the injured patient's legal costs under the new fixed recoverable costs procedure?
Fixed recoverable costs will be mandatory for all clinical negligence claims which fall within the scheme. This means that only a limited, fixed amount of the patient's legal fees (costs) for the work their lawyer has done to investigate and pursue their claim, and recover their compensation, can be reclaimed from the healthcare defendant after the patient has successfully settled their claim.

The proposed scheme will only affect the amount of legal costs that the patient can recover from the NHS or healthcare provider following a successful claim. It does not set a limit on the fee that is arranged between the claimant (patient) and their own lawyer, such as under a conditional fee agreement (CFA or no win no fee). Any outstanding fees (costs) over and above the fixed amount of costs that can be recovered from the losing defendant will instead be paid by the claimant rather than the healthcare defendant at the end of the claim.

The legal costs that can be recovered from the healthcare defendant at the end of a successful claim are fixed in advance and set out by the scheme.

In some cases the healthcare defendant's contribution to the injured patient claimant's legal costs will be limited to a maximum of £1,500. An additional sum equal to 10% of the compensation payment must also be paid where either:

- the patient's healthcare was criticised:
  - by a coroner;
  - in an NHS trust's Serious Incident Report;
- an admission that a negligent mistake has been made (whether or not it caused the injury);
- or the parties agree that no expert evidence is needed to prove breach of duty (negligence) or causation of injury.

In other cases, the proposed FRC scheme limits the healthcare defendant's contribution to the patient claimant's legal costs to a maximum of £6,000 plus an amount equal to 20% of the compensation settlement.

In some specified cases, additional fixed costs can be recovered for additional work that is needed to protect the interests of:

- an injured patient or claimant who is a child;
- an injured patient or claimant who lacks mental capacity;
- in FRC claims involving fatal injury, where legal representation is needed at a coroner's inquest for the purposes of the claim.

What happens next?
The consultation will close at 11:45pm on 24 April 2022.

The government says that it will consider the responses to the consultation and publish a full response. The proposals for any FRC scheme that is introduced will then need to be approved by the Civil Procedure Rule Committee before being implemented via a statutory instrument.

The scheme will then be reviewed not later than five years after implementation to consider what effect it has had. The government anticipates that at that time it will also consider whether the upper limit of the claim value should be increased from £25,000.

More details, including the consultation questions and a link or email address to respond to the consultation, can be found on the government website.

If you, or someone in your family, has suffered serious injury or disability from medical negligence and you would like to find out more about making a claim, you can talk to one of our solicitors, free and confidentially, by contacting us at
mednegclaims@boyesturner.com

Author
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https://www.boyesturnerclaims.com/our-people/richard-money-kyrle

Heart Scan Toolkit Unveils Hidden Damage from Atypical Heart Attacks

Heart imaging techniques already available on the NHS could be used to improve detection of underlying heart disease and treatment following a common but often overlooked type of heart attack, according to research we've funded and published today in Circulation.

Currently, there are no guidelines for doctors on how to best assess or treat a patient after they are diagnosed with a type 2 heart attack. This means that most people who have one do not undergo further testing or treatment, with only around a third of patients surviving after five years.

Drastically increase diagnosis

Now, in the first study testing heart imaging techniques in type 2 heart attack patients, scientists at the University of Edinburgh have found that performing a combination of heart scans on patients who are suspected of having a type 2 heart attack can drastically increase diagnosis of underlying heart conditions. This opens the door to immediate treatments and could prevent a second heart attack.

A 'traditional' (or type 1) heart attack happens when one of the small arteries supplying blood to the heart becomes blocked, which starves the heart muscle of oxygen and nutrients, and leads to damage. However, a type 2 heart attack – which accounts for 15 per cent of patients with damage to their heart 2 - does not involve a blockage. It occurs with illnesses that put the body under stress and when the oxygen being breathed in cannot meet the demands of the heart. This puts the heart under additional strain and can happen with conditions such as pneumonia, heart rhythm problems, or very low blood pressure.

Researchers looked at the results of different heart scans of 100 people who had been diagnosed with a type 2 heart attack using an ECG and a troponin blood test. They used an angiogram to look at the blood vessels in the heart, and echocardiogram and heart MRI scans to look at the structure and function of the heart in real-time.

Easily treatable

Two thirds of patients were found to have coronary artery disease, and one third were found to have heart muscle weakness, both conditions that are easily treatable. Over 50 patients were given a new diagnosis, and seven were re-diagnosed as having had a 'traditional' heart attack.

The team already plan to start a clinical trial to further look at patient outcomes after performing a combination of angiogram and echocardiogram scans in patients with type 2 heart attacks with hopes of expanding to an international trial.

Dr Andrew Chapman, BHF-funded researcher at the University of Edinburgh who led the study, said: *"We've provided much-needed evidence that heart imaging tools already available in hospitals can spot hidden heart conditions in people with this type of heart attack that we now know is common but often overlooked. These conditions can be easily treated once identified and we hope these results, combined with our upcoming clinical trial, will bring us closer to the first guidelines for diagnosis and treatment of a type 2 heart attack."*

Hope for new guidelines

Professor Sir Nilesh Samani, our Medical Director, said: *"Thankfully, more people than ever are surviving heart attacks. However, survival rates for a type 2 heart attack are much lower than a traditional heart attack. We urgently need new guidance for doctors on how to assess and treat these patients, which this research provides. This is a vital step towards helping people make a better recovery and reduce their risk of a second heart attack, heart failure and even death."*

We have launched a campaign calling for the public's support to power science that could lead to new treatments and cures for all heart and circulatory diseases.

HANDLING A DENTAL NEGLIGENCE CASE?

Dental consultant Toby Talbot, an independent expert witness with British and American training, has spent 25 years providing a fast track service for the legal community in cases of clinical negligence.

Toby assists courts, counsel and judges in making accurate and well-informed decisions in cases relating to restorative dentistry and all aspects of prosthodontics, periodontics, endodontics and implantology.

Consultation will be provided within days of written instruction and complete reports can be provided within ten days.

Causation, liability, prognosis and quantum are included, often rendering court hearings unnecessary.

Whether acting for the claimant or defendant, please call.

Toby Talbot
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Potential Pitfalls When Providing Expert Evidence in Personal Injury Cases

The primary duty of an expert witness is to the court, and this duty overrides any obligation to the party instructing or paying the expert. Expert evidence must be objective, independent, unbiased and based on all material facts.

Kimberley Owen considers some cases in which experts have made errors and been criticised by the judge. This can damage the expert's reputation and is sometimes the death knell for the instructing party who is relying on the expert evidence.

Expert witnesses should be familiar with part 35.3 of the Civil Procedure Rules and its Practice Direction, which sets out the requirements an expert must adhere to when preparing their report. The court will consider various factors including whether the expert evidence is tendered in good faith, whether the expert is responsible, competent and/or respectable, and whether the opinion is reasonable and logical.

Unconscious bias

Experts must take care not to form an opinion based on a view they may hold outside their conscious awareness and control.

In the case of *Palmer v Mantas* [2022] EWHC 90, the defendant argued that the claimant had exaggerated her symptoms following a road traffic accident, and there was a dispute over whether and to what extent the claimant had suffered a brain injury.

The neuropsychologist instructed by the defendant made some "judgemental and rather scathing comments" about the claimant, including that she was "self-pitying and histrionic", language which the expert conceded in oral evidence she would not have used to describe a man. The judge indicated that her language was "beyond that which is appropriate for an expert to employ and suggests a level of unconscious bias".

Interestingly the pain medicine expert instructed by the defendant was also subject to some criticism due to his over-zealous use of language and various errors and attacks made on other experts, for which he apologised. The judge found him to have departed from his Part 35 duty.

Insufficient expertise

Not being an expert in a particular field on which the expert is providing an opinion is dangerous territory.

In *ZZZ v Yeovil District Hospital* [2019] EWHC 1642, the judge had grave doubts about whether one of the experts had the expertise necessary to comment on the relevant injuries. While all the other experts opined that the only possible treatment for the claimant's condition was surgery, this particular expert recommended bed rest and analgesia (described by the judge as "quite remarkable").

Conflict of interest

Conflict of interest for an expert can take many forms, including a financial interest in the outcome of the litigation, a conflicting duty, or a personal or other connection with a party that might consciously or subconsciously influence or bias the expert's decision.

In the case of *EX v Barker* [2015] EWHC 1289 (QB), the expert had provided a reference for the defendant in the past. However, he failed to inform his instructing party of this or make any reference to it within his report; it only came to light during cross examination. Due to this, the judge chose to place no weight on the expert's evidence even though it was logically compelling.

An expert's conflict of interest also places obligations on the instructing party.

It was made clear in the case of *Toth v Jarman* [2006] EWCA Civ 1028 that the party calling the expert should inform the court of the existence of a conflict of interest (or potential conflict) at the earliest available opportunity to enable the court to decide whether the conflict of interest is material or not. Also, the other party should be made aware of the information as soon as possible.

A lack of awareness of the legal tests

An expert's familiarity with the relevant legal tests is vital.

In the cases of *Harris v Johnston* [2016] EWHC 3193 (QB) and *ZZZ v Yeovil District Hospital* [2019] EWHC 1642, the experts in question were unaware of the test for a professional negligence case.

In the former of these cases, the expert misunderstood the relevant test. Instead of asking whether a particular surgeon fell below the standards to be expected of the reasonably competent and experienced neurosurgeon operating on the patient, he equated professional negligence with the degree of competence that had to be demonstrated to pass a surgical examination.

Saying nothing is unacceptable

An expert will not avoid judicial criticism by saying nothing on a matter of relevance.

For example, in the case of *EXP v Barker* [2017], one party's expert was aware that the other party's expert evidence was seriously deficient and misleading as he had been an executive committee member of a body that could have been expected to know of various criticisms of a particular study.

The expert admitted in court that he had seen the other expert's report containing the relevant passage. He agreed that the study was not accurately described in the terms used by the expert, given the criticisms of the study. He knew the other expert's report was being relied upon regarding an important contested issue, yet he did nothing to draw anyone's attention to this. This resulted in him being criticised by the judge.

A failure to analyse the facts

Experts must consider and analyse all relevant facts, even if they disagree with them.

In the case of *Harris v Johnston* [2016], the judge noted that the relevant expert had not addressed in his report the defendant's pleaded case as to the mechanism of the injury sustained. He also failed to address this point adequately in his joint statement.

The court noted that an independent witness fulfilling his duties to the court should give an opinion based on the factual premise upon which a defence rests. This is so even if he takes issue with that factual premise, in case the court makes the same factual findings.

This expert failed to do this, instead basing his opinion on a mistaken factual premise and a complete misunderstanding. This was the case even though the defence expert had made him aware that he could be labouring under a serious misapprehension.

It transpired that this same expert had, in the same year, attracted judicial criticism for making factual assumptions about key matters in another case without taking any steps to check that his assumptions were correct.

In *ZZZ v Yeovil* [2019] EWHC 1642, the judge commented that the expert's failure to comment on one medical issue was "close to disingenuous", and he declared the expert to be "a wholly unreliable witness".

Conclusions

For an expert to avoid being criticised in court and to offer the maximum level of support to their instructing party they should:

- Take care to avoid unconscious bias;
- Ensure that they have sufficient expertise relevant to the case;
- Inform the parties of any potential conflicts of interest;
- Be fully aware of the relevant legal tests;
- Make all relevant information clear to the court;
- Consider all relevant facts, even if they disagree with them.

You can find further information regarding our expertise, experience and team on our Personal Injury pages:
www.stewartslaw.com/expertise/personal-injury/

If you require assistance from our team, please contact u at **www.stewartslaw.com**

Core Competencies for Expert Witnesses

Simon Berney-Edwards, Chief Executive of the Expert Witness Institute, outlines their new Competency Framework for Expert Witnesses, why it is important, and how you can use it.

What is the framework?
EWI has launched a core competency framework for Expert Witnesses which sets out the attributes, knowledge, and skills that experts must develop if they wish to act as an Expert Witness.

The framework was developed by senior members, the EWI Board and the EWI Team for the Expert Witness community, providing a clear articulation of the competencies required to undertake the important work that you do.

It is a useful tool in a number of ways:

- It outlines the knowledge and skills that are required of Expert Witnesses.
- It can be used as a self-assessment tool for you to think about your personal and professional development.
- It can be used for skills analysis, training, and career development plans and enables you to identify Continuing Professional Development opportunities and training needs
- It underpins EWI's levels of membership and the assessment and vetting process for each.
- If you are not yet a member, it can be used to assess the membership level you should consider.
- It can be used to assess relevant training courses for Expert Witnesses.

Why do we need a set of core competencies?
To be an Expert Witness, you need to be an expert. This may seem obvious, but being an expert is not the same as an Expert Witness.

An expert offers special expertise in a particular field. An Expert Witness, however, must develop additional knowledge, skills and competencies in order to fulfil their duty to the court. This framework outlines the full set of competencies which must be developed in order to become an Expert Witness.

News of Expert Witnesses who clearly do not understand their role or duties to the courts seem to be appearing with alarming regularity. The following recent examples highlight what Mr Justice Fraser states as *"a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties."* (See *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* (No. 2 Costs) [2021] EWHC 1414 (TCC))

Inappropriate language and unconscious bias
In *Palmer v Mantas & Anor* [2022] EWHC 90 (QB), Anthony Metzer Q.C (sitting as a Deputy High Court Judge) specifically warned two experts about the way they expressed themselves, stating that this was "beyond language which is appropriate for an expert to employ" and highlighted that this suggested a level of unconscious bias towards the claimant.

Lack of cooperation
In *Dana UK Axle Ltd v Freudenberg FST GMBH* [2021] EWHC 1412(TCC), because of the Defendant's breaches of the Pre-Trial Review Order, the expert evidence was excluded in full as there had been a serious breach of the requirement to provide full details of all the materials provided to the experts as well as disparity in access to the various sites involved in the case. Whilst this was a failing of the Defendants, in the Judge's view it was difficult to come to any conclusion other than that the guidance in the TCC Guide as to the need for experts to "co-operate fully" with one another, including, in particular "where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed", had been ignored.

Compliance
In *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd* [2021] EWHC 1116 (TCC), the Claimants' expert was criticised because he:

- persistently embellished (and exaggerated) his criticisms of the Defendant;
- constantly introduced new concepts or issues during his oral evidence which were not identified in his report;
- relied on material that had no relevance to the issues under consideration;
- went beyond his own expertise; and
- changed his agreement with, and reliance upon, the work of his associate whose report and work formed an appendix to his written report

Compliance (again!)
The judge in a recent murder trial has suggested the Crown Prosecution Service undertake an inquiry after it was found that the prosecution's Expert Witness had "lost sight of his overriding duty to the court and failed to comply with the requirements of Crim PD Part 19 and the CPS Guidance to Experts."

Concern had first been raised by the Defence team a week before the trial when they asked for the prosecutions expert's evidence to be declared inadmissible. This was because he had failed to:

- comply with the requirements of Crim PD Part 19
- specify in his report the material that he relied upon
- record/retain/note his findings

However, the judge did not have to rule on this because the "prosecution counsel, Mr Spence QC, after consultation with the CPS including the Deputy Chief Crown prosecutor, decided not to call Dr Ho as a witness. No explanation was given for the abandonment by the prosecution of Dr Ho as an expert witness."

Negligence

In *R-v-Liverpool-v-Mercier*, an expert was ordered to pay £50k in costs following the ruling of the judge that he had acted in a wholly unreasonable and negligent manner as an expert witness. The judge stated:

"*I formed the view during trial that Dr. Mercier was not making any efforts to assist the court, but instead wilfully sticking to his case theory irrespective of the questions asked or the evidence given. His evidence was grossly unhelpful and wholly unreliable in my judgement. I will not at this stage detail examples of the same, because it is not relevant to this application. The application before me is predicated on the specific assertion that it should have been obvious to Dr. Mercier at the outset, and at various stages throughout the proceedings, that he was not the appropriate expert to opine on the management, and treatment afforded to the Claimant on 8th November 2016.*"

Moreover, the judge concluded that they were "*entirely satisfied that but for Dr. Mercier's report this claim would not have been brought. All costs claimed within the Defendant's cost budget are therefore caused by Dr. Mercier's flagrant disregard for his duty to the court. A public body has been put to considerable expense in financing costly litigation that should not have been brought. Although it is not part of my considerations I observe that a hard-working oral and maxillofacial surgeon was maligned in public and undoubtedly caused significant distress by the actions of Dr. Mercier.*"

Conflicts of interest

A £3 million diamond fraud trial has collapsed at Southwark Crown Court in October 2021 after the Crown Prosecution Service failed to disclose evidence and their Expert Witnesses were found to have conflicts of interest.

Prosecutors claimed around 200 victims, many of whom were elderly, were conned after being convinced to buy coloured stones at a 600% mark up. But the case collapsed when it was found that the Crown Prosecution Service had failed to disclose evidence to the defence. It was also highlighted that the prosecution's Expert Witnesses had been found to have a conflict of interest and therefore it had been agreed that they would not be called to give evidence.

The Metropolitan Police instructed Expert Witnesses employed by Dreweatts auctioneers and valuers, a company which had a contract with the force to auction jewellery and watches seized in raids and prosecutions.

Narita Bahra QC who was representing one of the defendants said *"At the time of instruction the company was awaiting the outcome of their tender for the contract to be renewed. "The prosecution initially did not disclose the offer of a conditional fee agreement by the experts to the police who were paying their fees. Those experts had already given evidence in another trial, in the middle of their contract with the Metropolitan police where their relationship with the police was not disclosed."*

Unimpressive oral evidence

In *CSB 123 Ltd, Re [2021] EWHC 2506 (*Ch), the judge had to remind an Expert Witness, that they were "under oath and should not treat the giving of evidence in court as a game". The Judge concluded in the judgement that the Expert Witness' report was an unimpressive, results-driven piece of work. His attempts to defend it in oral testimony were entirely unpersuasive. In my judgement, very little weight can be placed on Mr Slack's written and oral expert evidence."

What does this mean for the Expert Witness community?

At our last conference, Her Honour Judge Anuja Dhir QC said: *"When an expert gives their opinion well it has a devastating impact on the outcome of a trial, so they shouldn't underestimate the importance of their evidence and the importance of getting it right".*

As an Expert Witness, Experts must develop additional knowledge, skills and competencies in order to fulfil their duty to the court.

Our Core Competency Framework articulates these and provides a framework for experts to develop those skills.

Core Competency Framework

Ethics, Values and Personal attributes are placed at the centre of the wheel as they are core to the individual and underpin their work as an Expert Witness.

Area of Expertise refers to the knowledge, skills, and experience developed by the individual which enables them to act as an expert in the field.

Expert Witness Competencies are the specific knowledge and skill sets required of an Expert Witness.

These competencies have been set within a **commitment to Continuing Professional Development (CPD)** (because it is essential that Expert Witnesses maintain their professional development relevant to both their area of expertise and their Expert Witness practice) and a **commitment to the Expert Witness Profession** (because it is vital that the community commits to the importance of appropriately trained Expert Witnesses and the improvement of standards of Expert Witness practice).

Assessing your knowledge and experience with the help of the Core Competencies
The Core Competencies Framework has been designed as a practical self-assessment tool.

This means you can carry out self-assessment of your knowledge and skills against all areas.

To assist you in doing this, the EWI has developed a set of self-assessment ratings which are included in the tool. These will help you consider your level of knowledge and skills in each area and identify areas that you might want to develop as part of your own Continuing Professional Development.

For those considering membership of the EWI, the expected levels for Knowledge and Experience for each competency have been mapped to the different levels of membership which enable you to consider the appropriate level of membership for which to apply.

Not just for new Expert Witnesses
Although the core competency framework outlines the skills you need to develop in order to become an Expert Witness, it isn't just for those who are new to Expert Witness work. In fact, the majority of cases which have appeared in the press lately involved experienced experts. The framework is there for anyone and highlights the importance of keeping up to date with CPD specifically related to your Expert Witness work, so you are aware of changes in procedures and approaches. This is fundamental to any Expert Witness practice.

And there is the point. By being a member of the Expert Witness Institute, you are demonstrating that you sign up to a code of professional conduct, that you take your duties as an Expert Witness seriously and are keeping up to date with your professional development. And this is why we continue to keep raising the profile of the Institute and advocate the importance of instructing properly trained Expert Witnesses.

Take a look
Now you know what it is, why don't you take a look? Here are a few practical suggestions:

- Read the Core Competencies for Expert Witnesses
- Use the self-assessment ratings to score your level of knowledge and experience
- Identify any areas that you want to develop and consider what training you need

You can download the competency framework from the **EWI** website at
www.ewi.org.uk/corecompetencies

This resource is freely available to all: You don't need to be a member of the Institute, however, you will need to register as website user.

Defendants Destroying Evidence in a Negligence or Injury Claim - What can the Court do?

by Philippa Luscombe

One of the issues that we regularly come across as claimant clinical negligence and personal injury solicitors is missing documentation. Ultimately, while witness evidence is important in a case, documentary evidence is often more compelling to a court. A claimant has to prove their case, and the starting point is often documentation.

In a clinical negligence case, documentation will be medical notes and correspondence; in an accident at work, it might be an accident book and risk assessments. In other cases, the key evidence might be photographs, telephone records, evidence of previous similar incidents, minutes of meetings, or text messages. The earlier we are instructed, the better chance we have of being able to collate the evidence needed to assess and, if appropriate, pursue the claim.

However, what happens when a defendant destroys key evidence or denies it exists? Sometimes all we can do is ask for evidence, then accept the explanation as to why it either never existed or does not now exist. It may be the case that missing evidence is more problematic for the defendant than the claimant. In many cases, appropriate records may not have been kept, while in other circumstances a long period of time has passed, and records were destroyed without any knowledge that they would be relevant in later litigation.

However, sometimes, there are indications that a potential defendant has deliberately destroyed key evidence in anticipation or knowledge of a likely claim. The court was asked to look at this scenario in the recent case of Ayannuga & Ors v One Shot Products Ltd, heard recently by Mr Justice Martin Spencer.
This case related to chemical cleaning products supplied by the defendant, One Shot Products. It was alleged that the products manufactured by the defendant were unsafe and had led to the death and injury of persons who had used it - the claimants in this case. The defendant was notified of the potential claim in late 2013 and responded to the claimants' representatives to advise that the matter had been passed to their insurers.

Proceedings were issued in late 2017. The case was disputed, and by 2021 the matter had reached the disclosure stage in the court timetable. The claimants were seeking disclosure of a range of documentation from the defendant, including seeking to ascertain if there had been other incidents involving the product in question, that the defendant had been aware of prior to the injuries suffered by the claimants in this litigation.

The claimants were advised that no original documentation remained, and that what had existed had either been destroyed or transferred into electronic form. Disclosure of the electronic documents was offered. The claimants' representatives were concerned that key documentation was missing, and pressed for further information about the hard copy documentation, including what had been destroyed and when. Eventually, it transpired that all of the relevant hard copy documentation had been shredded in 2016.

The issue was not so much that the defendant had moved to electronic storage, but that by the time the documentation was destroyed they were clearly aware of the litigation being pursued and the relevance of this documentation, and thus were under a duty to retain this original documentation for disclosure. In addition, only documentation from 2009 had been transferred to electronic storage – everything pre-

dating 2009 had been destroyed in its entirety, and there were concerns that even the post 2009 documentation was not complete.

The claimants' solicitors raised further questions about how and when these documents had been destroyed, and their relevance. In the absence of any real response, they issued an application to determine what had been destroyed, and to seek orders that the defendant cooperate in exploring further avenues to identify and locate some of the missing documentation.

Some of the issues that the judge Mr Justice Spencer had to consider were:

- Who should provide witness evidence? The defendant had opposed a statement about the documentation from a specific individual, but the judge ruled in favour of the claimants.
- What information the defendant could be compelled to provide about the origins of the documentation? Mr Justice Spencer ruled that in light of the documentation being destroyed, this information was appropriate so that the claimants could make further enquires and see if any other copies existed.
- Should further searches be carried out for electronic documents? Here the judge ordered that the defendants had to provide details of what had been scanned, and that the claimants were permitted to have their forensic IT expert access the defendant's computer and hard drive to see if any further relevant documentation could be located and identify what may have been uploaded and then deleted.
- Whether other information should be provided by the defendants' insurers, relevant to other claims and the defendants being on notice of an issue with the product in question. Mr Justice Spencer ordered that such enquiries were appropriate, and the insurers should cooperate.

It is not known what further information came to light because of these enquiries but some key points to take from this case are:

- The court will not look favourably on a defendant who is on notice of a claim and destroys original documentation that they know, or ought to know, is relevant to that claim.
- A defendant who does so may end up being ordered to take steps to provide access to information that they would never normally have to do, and that a court is likely to be amenable to allowing the claimant to seek and access information that would not normally be permitted.
- Early notification of claims provides a claimant with some protection against documents being destroyed, accidentally or otherwise.
- Claimants should consider early on what documentation is relevant and make appropriate requests.
- Where a defendant does not provide appropriate disclosure and does not have a satisfactory explanation as to why it cannot meet its disclosure obligations, claimants should consider what other ways there may be to access that information, and the benefits of applying to the court for permission to pursue those routes if the defendant will not cooperate.

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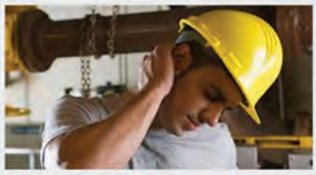

Industrial Diseases

Mental Health Act

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RICS named by UK Government as Approved Arbitration Body

On 25 March, the moratorium on evicting commercial tenants ended, and the Commercial Rent (Coronavirus) Act came into effect, sending Covid rent arrears disputes between commercial landlords and tenants to binding arbitration.

RICS has been selected by government to be an Approved Arbitration Body, and we expect that we will soon receive applications to appoint chartered surveyors to act as arbitrators under this legislation. To meet anticipated demand, RICS has developed a tailored Covid Rent Arrears Arbitration Service, drawing on a specialist panel of commercial arbitrators with decades of experience working with landlords and tenants.

These arbitrators are expert in assessing the viability and profitability of tenant businesses for the purpose of determining their rents. This skill, and the ability to deal with accounting records as evidence, lie at the heart of the new legislation, and ideally equip RICS arbitrators to decide the twin questions of business viability and rent affordability prescribed by the new law.

RICS Covid Rent Arrears Arbitration also supports the government's drive to help SMEs and individual parties - it provides transparent levels of set fees in small cases, and an opportunity for parties to liaise with the arbitrator to determine in advance how much larger and more complex cases will cost them.

RICS Covid Rent Arrears Arbitration opens up an important new area of opportunity for RICS members, both as arbitrators and in representing landlords and tenants in this process.

The role RICS has played in helping to shape this government initiative, which will help to maintain a positive future for the UK high street, confirms RICS's long held position as a pre-eminent thought leader in the commercial property sector.

Please visit: www.rics.org/covid-rent-arrears-arbitration to read about the RICS Covid Rent Arrears Arbitration Service

Legal Expenses Cover 'Driving A Sharp Rise in Domestic Property Disputes'

Legal expenses cover in household insurance policies is driving a sharp rise in domestic property disputes, says building surveyor ***Tony Mancini.***

He said householders are 'no longer frightened of falling out' with neighbours or contractors because their legal bills are increasingly being met by insurers. Mr Mancini is a partner at national surveying and property management firm Scanlans and most of his work nowadays involves acting as an expert witness in property-related wrangles.

The firm has seen a 30 per cent spike over the past two years in this field, concerning disputes over home improvements such as extensions, new kitchens and bathrooms and landscaping, as well as matters involving party walls, boundaries and cavity wall insulation projects.

And Mr Mancini expects the surge in disputes to continue as a result of the pandemic, as people have invested in their homes rather than going on holiday abroad.

"We're busier than ever with expert witness work and I can only see this increasing," he said.

"People don't seem to be frightened of falling out any more. More and more people have legal expenses cover with their household insurance policies, and they are not afraid to make a claim under it.

"Cases involve householders refusing to pay their builder, installer or contractor, but also where tradespeople have done the work and cannot get paid because of alleged defective workmanship.

"The insurers need to know whether there is any merit in the claim, and appoint solicitors to act on their behalf.

"As surveyors, we are instructed by the solicitors as expert witnesses and we produce an independent report on the matter in dispute.

"These range from household extensions, new kitchens and bathrooms, landscaping, boundaries, party wall issues and, increasingly, cavity wall insulation claims."

Mr Mancini, who heads Scanlans' building surveying team added, *"Cavity wall insulation claims are multiplying rapidly. They stem from the government's commitment to improve the insulation standards in older housing stock. Homeowners were eligible for grants because of this desire to improve the country's housing stock.*

"Following on from this, there has been a flood of people signing no-win, no-fee agreements with solicitors to bring action against the installers, claiming faulty workmanship or damage to a property. Many of these installers are no longer trading, so the cases are being brought against their public liability insurers."

Mr Mancini and his team are increasingly being called upon to check whether the installation was carried out properly and whether it caused any property damage.

He said many claims are unjustified and end up being discontinued, or going to trial and being thrown out. However, some do prove to be well-founded, and can result in significant damages being awarded.

Mr Mancini is one of three partners heading Scanlans. The others are Ian Magenis and Neil Inman. Between them the trio have clocked up nearly 80 years at Scanlans.

In 2021 Mr Mancini celebrated a quarter of a century at Scanlans. He joined the practice in 1996 as its first building surveyor and became a partner four years later.

For more information, visit **www.scanlans.com**

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Creating that Perfect Home

Smithers Purslow's (SP) client, Peter, is a teenage boy who, following an accident, has physical and mental disabilities. A financial settlement was agreed, based upon the amount needed to provide a suitable lifetime home, including upkeep and full-time care costs.

In 2018, SP's Expert Witness department analysed the medical reports provided by its client's legal team to determine the likely size and schedule of accommodation Peter would need. Using base information, a property search was carried out to find a plot of land that would be suitable for the new house, in an area Peter's family wanted to live.

When a potential site was found in North Yorkshire, SP's Architecture team helped prepare a feasibility study to determine if it was possible to build a house to the size required, on the site, and they submitted a budget for the project.

SP's brief included specialist accommodation for Peter, with closely-annexed space for his two carers to include bedsits, a kitchen and shower room. Peter's mother also required her own living space, kitchen, bathroom and bedroom, connected to the main house, but with its own entrance for privacy.

SP suggested a two-storey scheme, costing approximately £800,000. This was agreed by both parties and included in the final settlement figure.

In 2019, the Expert Witness team fully handed over the project to their Architecture colleagues. Their first task was to meet Peter, his mother, case manager and carer to discuss the project brief in greater detail so the team could better understand Peter's particular needs and the family's aspiration for what would become their 'forever home'.

While there were practical matters to assess, the most important features for Peter were his trampoline pit and 'disco' bath – a specialist bath that raised and lowered for easy access. Peter's main concern was that the bath had flashing, coloured lights and a surround sound music system.

With this information, the team amended the design so it included all the accommodation needs and was aesthetically sympathetic to the local vernacular. Next step was to consider how the project would be built and deal with practical issues such as the property's location within a flood risk area.

After the client approved the project design, it was submitted for Planning Approval. The process should take eight weeks from the date the submission's validated by the Local Authority Planning Department, but frequently takes longer due to the resources available to the authority.

In order to progress the project, SP agreed with the client its architects would begin the detailed design of the building, while waiting for Planning Approval to come through. This meant Building Regulations approval could be applied for and production information developed, without delaying the project.

SP has long been a proponent of sustainable design and after discussing this with the client, increased insulation levels above Building Regulation standards and specified triple glazing to the windows to reduce heat loss and reduce noise within the building. PV panels were installed on the south-facing roof to reduce electricity running costs and the building was designed with a sustainable urban drainage system so no rainwater discharge went into the mains sewers.

The detail design is an important stage involving full client engagement. The client needs to appreciate all the finishes going into the building, and make final decisions on important matters to the family, such as floor and wall finishes; bathroom and kitchen fittings. Although the house is being designed for a person with special needs, it's vitally important the building is a home and not a clinical environment.

SP received planning approval for the project in 2020 and shortly afterwards invited a number of trusted contractors, familiar with this kind of project, to tender for the works. After a four-week tender period the results were analysed and a contractor appointed.

In addition to its client, SP also reported to the trustee appointed by the Court of Protection and all costs relating to the project had to be agreed before proceeding.

The project took six months to build, during which time all parties kept in regular contact; everyone was engaged and a spirit of collaborative working was maintained at all times. Communication and involvement is key to a successful project, as one of the most important things a project manager can do is listen. As the project neared completion SP arranged a 'topping out' ceremony for Peter, which involved him pushing into place, with a little help, the final piece of masonry. This stone meant it was, most definitely, Peter's House.

At the end of August 2021 Peter, his mother and care team arrived on site to be given the keys to the completed building. After he looked around the house, Peter was asked what he thought of it. Hearing him reply 'it's perfect', is a great achievement.

Author - Barry Ford

Smithers Purslow - February 2022.

Smithers Purslow is an engineering, surveying and architectural practice handling high net worth and complex building, construction and property claims for the insurance market. Founded in 1978, SP employs 125 chartered engineers, surveyors, architects and support staff from its Glaston head office and branches in: Chester, Exeter, Leeds, Llandudno, London, Manchester, Newcastle, Nottingham and Reading.

In 2016, SP was the first in the professional services sector to be given Platinum Investors in People status and, at the time, was one of only 16 businesses to achieve this accolade worldwide. In 2019, the firm secured the same Platinum renewal status.

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