

What are the golden rules for challenging the findings in a single joint expert's report and so gain an advantage for your clients?

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Expert evidence – legislative and procedural framework

- FPR 2010 r25.2: ‘expert’ means a person who provides expert evidence for use in proceedings
- Non-children proceedings governed by
 - FPR 2010 Part 25, PD25B, PD25D
- Children proceedings governed by
 - Section 13, The Children and Families Act 2014
 - FPR 2010, Part 25 , PD25B, PD25C

Expert evidence – legislative and procedural framework

- FPR 2010 r25.4
- *(1) This rule applies to proceedings other than children proceedings.*
- *(2) A person may not without the permission of the court put expert evidence (in any form) before the court.*
- *(3) The court may give permission as mentioned in paragraph (2) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings.*

Expert evidence – legislative and procedural framework

FPR 2010 r25.4(2) A person may not without the permission of the court put expert evidence (in any form) before the court.

- Expert evidence is opinion evidence
- a witness may only give evidence in relation to factual matters which they have seen themselves
- Expert evidence - an exception to this general rule.
- As an exception the court's permission is required before expert evidence may be before the court
- **But, non-children proceedings can instruct an expert without first gaining permission of court**

Expert evidence – legislative and procedural framework

FPR 2010 r25.4(2) The court may give permission as mentioned in paragraph (2) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings.

- Expert evidence if required ‘*to assist the court with matters within the experts’ expertise*’
- see e.g. President’s Memorandum: experts in the family court (4.10.21)
Necessity – more than ‘*merely reasonable, desirable or of assistance*’ (see *Re H-L (A Child)* [2013] EWCA Civ 655)
- ‘*Necessity sets a higher threshold than the standard of “assisting the court”*’

Expert evidence – legislative and procedural framework

FPR 2010 r25.11: Court's power to direct that evidence is to be given by a single joint expert

(1) Where two or more parties wish to put expert evidence before the court on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.

(2) Where the parties who wish to put expert evidence before the court ('the relevant parties') cannot agree who should be the single joint expert, the court may –

- (a) select the expert from a list prepared or identified by the relevant parties; or
- (b) direct that the expert be selected in such other manner as the court may direct.

Expert evidence – legislative and procedural framework

- FPR 2010 r25.5
- *(2) When deciding whether to give permission as mentioned in rule 25.4(1) in proceedings other than children proceedings, the court is to have regard in particular to –*
 - (a) the issues to which the expert evidence would relate;*
 - (b) the questions which the court would require the expert to answer;*
 - (c) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings;*
 - (d) any failure to comply with rule 25.6 or any direction of the court about expert evidence; and*
 - (e) the cost of the expert evidence.*

Expert evidence – legislative and procedural framework

President's Memorandum – *Experts in the Family Court*

(4 October 2021)

- the court should adopt a rigorous approach to the admission of expert evidence;
- to avoid delay the courts should continue to consider each application for expert instruction with care so that an application is granted only when it is necessary to do so;
- When determining whether expert evidence is admissible, the Family Court should follow the guidance of Lord Reed as set out in the Supreme Court's decision in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, summarised as follows:
 - will the proposed expert assist the court in its task;
 - does the expert have the necessary knowledge and experience;
 - is the witness impartial in his presentation and assessment of the evidence; and
 - is there a reliable body of knowledge or experience to underpin the expert evidence.?

Expert evidence – legislative and procedural framework

- FPR 2010 PD 25B 3.1 Expert's overriding duty to the court
- Part 25 r25.6: The parties must apply for the court's permission as soon as possible and no later than the First Appointment
- FPR 2010 PD 25B 9.1 Contents of expert's report
- FPR 2010 PD 25D 3.3 Party wishing to instruct must make and disclose preliminary enquiries and provide proposed expert CVs (PD 25D 2.1)
- Application pursuant to Part 18 FPR 2010

Expert evidence – legislative and procedural framework

FPR 2010 r25.7(2)(a):

- (i) the field in which the expert evidence is required;
 - (ii) where practicable, the name of the proposed expert;
 - (iii) the issues to which the expert evidence is to relate;
 - (iv) whether the expert evidence could be obtained from a single joint expert;
 - (v) the other matters set out in Practice Direction 25C or 25D, as the case may be; and
- (b) a draft of the order sought is to be attached to the application notice requesting the court's permission and that draft order must set out the matters specified in Practice Direction 25C or 25D, as the case may be.

Expert evidence – legislative and procedural framework

FPR 2010 PD25D 3.11:

In addition to the matters specified in FPR 25.7(2)(a), an application for the court's permission to put expert evidence before the court must state –

- (a) the discipline, qualifications and expertise of the expert (by way of C.V. where possible);
- (b) the expert's availability to undertake the work;
- (c) the timetable for the report;
- (d) the responsibility for instruction;
- (e) whether the expert evidence can properly be obtained by only one party;
- (f) why the expert evidence proposed cannot properly be given by an expert already instructed in the proceedings;
- (g) the likely cost of the report on an hourly or other charging basis;
- (h) the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.

Expert evidence - Challenge

Critical analysis of report (shadow expert?)

Part 25 r25.10: Written questions to experts:

- must be proportionate;
- must be put within 10 days beginning with the date on which the expert's report was served;
- must be for the purpose only of clarification of the report.

Expert evidence - Challenge

- Impartiality is ‘the essence of an expert’s opinion’

‘If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible.’

- *‘The Ikarian Reefer [1993] 2 Lloyd’s Rep 68 as cited in Kennedy v Cordia LLP [2016] UKSC 6 per Lord Reed*

Vernon v Bosley (No 1) [1996] EWCA Civ 1310 Thorpe LJ :

The area of expertise in any case may be likened to a broad street with the plaintiff walking on one pavement and the defendant walking on the opposite one. Somehow the expert must be ever mindful of the need to walk straight down the middle of the road and to resist the temptation to join the party from whom his instructions come on the pavement

Expert evidence - Challenge

Has the expert complied with:

- FPR 2010 PD 25B 4.1: Particular duties of the expert
 - (a) to assist the court in accordance with the overriding duty;
 - (b) to provide advice to the court that conforms to the best practice of the expert's profession;
 - (c) to answer the questions about which the expert is required to give an opinion;
 - (d) to provide an opinion that is independent of the party or parties instructing the expert;
 - (e) to confine the opinion to matters material to the issues in the case and in relation only to the questions that are within the expert's expertise (skill and experience);

Expert evidence - Challenge

- (f) where a question has been put which falls outside the expert's expertise, to state this at the earliest opportunity and to volunteer an opinion as to whether another expert is required to bring expertise not possessed by those already involved or, in the rare case, as to whether a second opinion is required on a key issue and, if possible, what questions should be asked of the second expert;
- (g) in expressing an opinion, to take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed;
- (h) to inform those instructing the expert without delay of any change in the opinion and of the reason for the change.

Expert evidence - Challenge

FPR 2010 PD25B 9.1: Contents of expert report

- indicate whether an opinion is an hypothesis or controversial
- Summarise the range of opinion
- Give reasons for the opinions expressed – use of a balance sheet approach

Expert evidence - Challenge

Second opinion:

- No guidance or specific provision in FPR 2010
- ‘*Daniels v Walker*’ application (Daniels v Walker [2000] EWCA 508 Lord Woolf):

“[27] ... Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert, or, if appropriate, to rely on the evidence of another expert”

Expert evidence - Challenge

Daniels v Walker

“[28] *In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert’s report, a party, **for reasons which are not fanciful**, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert’s report which he or she may wish to challenge, then they should, **subject to the discretion of the court**, be permitted to obtain that evidence.”*

Expert evidence - Challenge

Cosgrove & Anor v Pattinson [2001] CPLR 177 Neuberger J

- ‘The nature of the issue or issues.
- The number of issues between the parties.
- The reason the new expert is wanted.
- The amount at stake and, if it is not purely money, the nature of the issues at stake and their importance.
- The effect of permitting one party to call further expert evidence on the conduct of the trial.
- The delay, if any, in making the application.
- Any delay that the instructing and calling of the new expert will cause.
- Any other special features of the case.
- The overall justice to the parties in the context of the litigation [an “all-embracing” factor]

Expert evidence - Challenge

Peet v Mid-Kent Healthcare NHS Trust [2001] EWCA Civ 1703 Lord Woolf:

- ‘[28] ... where parties agree that there should be a single joint expert, and a single joint expert produces a report, it is possible for the court still to permit a party to instruct his or her own expert and for that expert to be called at the hearing. **However, there must be good reason for that course to be adopted.** Normally, where the issue is of the sort that is covered by non-medical evidence, as in this case, the court should be slow to allow a second expert to be instructed.
- [29] ... the fact that the sums at stake may be substantial does not justify the departure from the general approach in relation to single experts which I have just sought to indicate. If there is an issue which requires cross-examination, or requires additional evidence, that is one thing. But the court should seek to avoid that situation arising, otherwise the objectives of having a single expert will in many situations be defeated.’

Expert evidence - Challenge

- In *Kay v West Midlands Strategic Health Authority* (4 July 2007, unreported) HHJ Macduff QC:

*Where a party requests a departure from the norm and makes what one can term a Daniels v Walker application, all relevant circumstances are to be taken into account but principally the court must have its eye on the overall justice to the parties. This includes what I have called the balance of grievance test. **The application will only succeed in circumstances which are seen to be exceptional and to justify such a departure from the norm.***

Expert evidence - Challenge

Bulic v Harwoods & Ors [2012] EWHC 3657 (QB) Eady J

- ***‘What represents justice between the parties will very much depend upon the facts of each case’*** [16].
- *‘the saving of time and money is likely to assume greater significance in inverse proportion to the centrality of the issues’* [16].
- *‘Where the court is concerned with a relatively “peripheral” issue as in Kay, it is likely to be only in unusual circumstances that the services of a single joint expert will be dispensed with’* [16].
- ***‘the court is less likely to be ready to dispense with a single joint expert where the evidence is of a non-technical nature’*** [17].
- *the court was likely to obtain more assistance from comparing two experts on technical matters than where the issue involves matters of ‘personal judgment, discretion and general impression based on experience’*

Expert evidence - Challenge

Hinson v Hare Realizations Ltd (2) [2020] EWHC 2386 (QB) Martin Spencer J:

- *the correct approach had been elucidated by Lord Woolf in Daniels v Walker, who stated that permission to obtain the desired new expert evidence could be permitted for ‘reasons which are not fanciful ... subject to the discretion of the court’ [21]*
- *The words ‘subject to the discretion of the court’ were deemed to be ‘important’ in this context given that, as Eady J said in Bulic, the Court of Appeal ‘did not intend to apply any straitjackets to the court’ [21].*
- *The judge further emphasised that as Eady J had pointed out what represents justice between the parties will be very fact-sensitive, so that it may be distracting to focus too analytically on the reasoning in other cases, however authoritative, where the facts were not truly comparable [22].*

Expert evidence - Challenge

Financial Remedy cases:

- In *R v K (Financial Remedies: Conduct)* [2018] EWFC 50 Baker J: “. . . there was a very substantial dispute as to the value of those assets.”
- *FW v FH* [2019] EWHC 1338 (Fam) Cohen J: “Both sides were dissatisfied with the conclusion.”
- *E v L* [2021] EWFC 60 Mostyn J: “The husband took strong exception to the evidence of Mr Isaacs, and I allowed him to adduce his own accountancy evidence.”

Expert evidence - Challenge

Summary of approach:

- Assumption is that expert evidence will be by way of SJE
- fact-sensitive
- Financial remedy cases/civil cases
- Modest financial value no barrier to instruction of an additional expert (*Bulic*)
- What might the court need help with? ‘Technical’ matters as opposed to matters of ‘personal judgment, discretion and general impression based on experience’ (*Bulic*)?

Expert evidence - Challenge

Wells v Wells [2002] 2 FLR 97: [185] Lewison LJ:

- *H v H* [2008] 2 FLR 2092 Moylan J said at para [5] that ‘valuations of shares in private companies are among the most fragile valuations which can be obtained’.
- No obvious market for a private company.
- Even where valuers use the same method of valuation they are likely to produce widely differing results.
- The profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture.
- The difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious.
- The acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: *A v A* (Ancillary Relief: Property Division) [2006] 2 FLR 115, at paras [61]–[62]; and *D v D and B Ltd* [\[2007\] 2 FLR 653](#) (both decisions of Charles J).”

Expert evidence - Challenge

Practicalities of *Daniels v Walker* applications:

- Instruction of ‘shadow’ expert
- Same requirements as SJE instruction
- Supported by
 - Narrative explanation; or
 - Note from shadow expert; or
 - Full shadow report

Expert evidence - Challenge

- Liaison between experts (Court can order experts to attend meeting FPR 2010 r25.16(1))
- At the meeting, the focus of discussions may be specified by the court, but it is expected to include (FPR, PD 25(E) 2.1):
 - the reasons for disagreement on any expert question and what, if any, action needs to be taken to resolve any outstanding disagreement or question;
 - an explanation of existing evidence or additional evidence in order to assist the court to determine the issues;
- FPR, r 25.16(3), a Statement of Agreement and Disagreement must be prepared which should be agreed and signed by each of the experts who participated in the discussion. The statement must contain a summary of the experts' reasons for disagreeing. The statement should be served and filed not later than five business days after the discussion has taken place.

Expert evidence - Challenge

- Financial Remedies Practice 2022-23: ‘the court should not grant permission to adduce expert evidence on the same subject on a party’s behalf until there has been a meeting between the SJE and the proposed new expert’
- But, Rayden & Jackson para 13.189:

“It may be that the requirement in *Daniels v Walker* for the experts to meet and discuss issues before a decision is made by the court as to what evidence can be adduced at trial either requires adaption in financial remedy proceedings, or in effect gives rise to a two stage process where first an application needs to be made for the single joint expert to meet the proposed new expert, and then subsequently a decision is made as to whether evidence can be admitted from the proposed new expert.”

Expert evidence - Challenge

- Does the *Daniels v Walker* application need to be “necessary”?
 - on a *Daniels v Walker* application the court is not deciding whether expert evidence is required on a given issue ‘to assist the court to resolve the proceedings’ but by whom the evidence is to be given;
 - the CPR equivalent of ‘necessary’ – which remains ‘reasonably required’ – was not referred to in the criteria used in any of the civil cases referred to above.

Expert evidence - Challenge

- Good reasons why the court promotes the use of SJE evidence
- Consider a further report in certain cases, particularly in relation to the quantification of complex assets where one expert's professional judgment may differ considerably to that of another.
- Process of having considered a *Daniels v Walker* application will have assisted preparation for trial and cross examination of expert

Expert evidence - Challenge

- Expert evidence is given in a written report unless the court directs otherwise. Therefore, the court will not direct an expert to attend a hearing unless it is necessary to do so “in the interests of justice” (FPR, r 25.9). However, if there are large areas of disagreement, and it is therefore considered necessary, PD 25B, paras 10.1 and 10.2 set out the arrangements that must be made.
- *CB v KB (Financial Remedies: Calculation of Income Streams and Child Support)* [2019] EWFC 78, [2020] 1 FLR 795, Experts gave evidence concurrently (“Hot-tubbing”) Part 35 of the CPR.

Thank you

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