

Talking Point: Engineering and Construction - Asia (July 2011)

What happens if my expert witness changes sides?

Whilst many have been getting excited about the removal of an expert witness's immunity from suit in *Jones v Kaney* [2011] UKSC 13, another recent decision, about an expert witness not just changing her mind but changing sides, might have slipped your attention. In this month's Talking Point, we look at the important issue of the ownership and independence of experts and how you can protect your case if your expert's evidence is challenged.

When will a court intervene to protect privileged and confidential information?

The decision in *Meat Corporation of Namibia Ltd v Dawn Meats (UK) Ltd* [2011] EWHC 474 (Ch) illustrates that it might not be as easy as you think to persuade a court that evidence given by an expert who has changed sides to act for your opponent should be excluded.

MeatCo gave its expert witness, Mrs B, privileged and confidential information based on her expressed interest in acting for MeatCo. Mrs B then changed her mind and subsequently agreed to act for the defendant, Dawn Meats. MeatCo applied to the court to have Mrs B's evidence excluded on the grounds that she had received confidential and privileged information from MeatCo and was now acting as a consultant for Dawn Meats. She therefore lacked independence. MeatCo also alleged that Mrs B was involved with the transactions that were the subject of the underlying action. However, the judge reviewed the relevant case law and held, on the facts, that the information received would not influence the expert's evidence and that the expert's undertaking not to disclose MeatCo's confidential and privileged information was a sufficient safeguard. The court was therefore satisfied that the expert could give evidence and refused MeatCo's application.

The judge's application of the authorities to the facts of this case serves as a useful reminder of the circumstances in which a court will intervene to protect privileged and confidential information handed to an expert who has changed sides.

MeatCo sought to rely on the law as laid down in the case of *HRH Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, likening the position of Mrs B to KPMG in that case. In *Prince Jefri*, KPMG had provided litigation support services to the Prince, which required access to highly confidential information. In *Prince Jefri*, the House of Lords decided that the accountants were essentially occupying the same position as solicitors and should therefore be excluded from acting for their opponent in litigation. MeatCo argued that the essence of *Prince Jefri* was

the protection of privileged information and that it should be afforded similar protection.

The court disagreed with MeatCo and called it a "mechanistic approach" to equate the circumstances in *Prince Jefri* to the present case. Distinguishing *Prince Jefri* on its "striking" facts, the court found that in *Prince Jefri*, the accountants were in the same position as solicitors and that the relationship between Mrs B and MeatCo was very different from the relationship of solicitor and client. It also found that, unlike KPMG, Mrs B had not yet been engaged by MeatCo - the terms of her retainer with MeatCo had not yet been determined. Furthermore, unlike in *Prince Jefri* where the privileged information was extremely damaging to Prince Jefri, the nature of the privileged information disclosed to Mrs B had been reviewed by the court and was found to be fundamentally uninteresting to Dawn Meats. In respect of any information that may have been of interest to Dawn Meats, this would be adequately covered by Mrs B's undertaking not to disclose any confidential information.

Dawn Meats had pressed the point further, asserting that, because there was no property in a witness, the complaint was not valid. In advancing this argument, Dawn Meats relied on the Court of Appeal's decision in *Harmony Shipping Co SA v Saudi Europe Line Limited* [1979] 1 WLR 1380, which involved a handwriting expert who unwittingly gave advice to both sides in a case. *Harmony Shipping* did not address identical circumstances, since in that case, the expert had recused himself but was being compelled to testify by subpoena. Nevertheless, the Court of Appeal confirmed the basic principle that there is no property in a witness, whether an expert or a witness of fact, and noted that it would be against public policy if, in a sphere of a small number of experts, one party were able to buy up all the possible experts. It also acknowledged that there would be many situations where communications between solicitors and expert witnesses would be privileged and that it was the duty of the court to protect the witness from disclosing inappropriate material.

Two further cases cited by MeatCo, *R v Davies* [2002] EWCA Crim 85 and *Sage v Feiven* [2002] CLY 430, in which experts consulted by one side were not allowed to act for the other, were distinguished. In both those cases, it would not have been possible for the expert to separate out the privileged material, and the use of privileged material would have been inevitable. Under such circumstances, the court will intervene to protect that privileged information.

www.hoganlovells.com

When will a court allow a challenge to an expert's independence?

MeatCo further challenged Mrs B's independence on the grounds of Mrs B's consultancy with Dawn Meats and of MeatCo's allegations that Mrs B was involved with the transactions that were the subject of the underlying action.

The court set out the general principle that, although it is desirable that experts have no actual or apparent interest in the outcome of the proceedings, the mere existence of such an interest would not automatically render the evidence of an expert inadmissible. The court recognised that in some circumstances a party's employee may be an expert. The nature and extent of the interest should be considered and appropriate weight given to any effect that such an interest may have on the evidence given. While, for case management purposes, such questions should be handled as soon as possible, the court noted that under circumstances where it is not possible to determine with sufficient clarity the nature and extent of any such interest at an interlocutory stage, the issue of independence may be one for determination at trial.

MeatCo cited the Court of Appeal's position in *Toth v Jarman* [2006] EWCA Civ 1028 to support its argument that "where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced". The Court of Appeal went on to qualify this: "The conflict of interest could be of any kind...but ultimately, the question of what conflicts of interest fall within this description is a question for the court, taking into account all the circumstances of the case". The court in *MeatCo* emphasised that the finding of a conflict of interest was not a black and white issue, the materiality of which could be decided between the parties; potential issues should be brought to the court's attention at the earliest possible opportunity.

In *Toth v Jarman*, the Court of Appeal went so far as to recommend that the UK civil procedure rules be extended to require experts to make specific declarations regarding any potential conflicts of interest at the end of their reports.

Upon examination of Mrs B's role as a consultant, the court found that the arrangement required only the performance of occasional, discrete and self-contained activities, which would in no way imperil her independence. The court held that "whether an expert is disqualified by reason of a connection with a party will depend on all the facts of the case, and not on single bright-line considerations such as whether or not he or she is already in some form of contractual relationship with the party who seeks to call that expert". The decision in *Field v Leeds City Council* [1999] CPLR 833 had established that the employment of an expert by one party did not automatically disqualify him from giving evidence. Of course, Mrs B's relationship could still affect the weight given to her evidence.

What if I think the other side's expert has an interest in the underlying transaction that is the subject of the claim?

In relation to Mrs B's alleged involvement in the underlying transactions, the facts were in dispute. Accordingly, the judge was not able, at this interim stage, to find sufficient justification to find Mrs B's independence compromised. He did, however, add that MeatCo "is not prevented from challenging the degree of her independence in cross-examination at trial", which may "have the effect of seriously, if not fatally, undermining her evidence".

What do the 2009 Civil Justice Reforms on Expert Evidence say on these matters?

The Hong Kong civil procedure provisions on expert evidence were amended by the Civil Justice Reforms in 2009. In addition to requiring expert evidence to be verified by a Statement of Truth (as with all pleadings and witness statements), the Reforms also require expert witnesses to be provided with the new Code of Conduct for expert witnesses "as soon as practicable". The Code reinforces the expert's overriding duty to assist the court and not the party from whom the expert has received instructions or payment, and requires a further declaration that the expert has read and understood the Code and has complied with and will continue to comply with the duties provided therein.

How can the Reforms help me if my expert's evidence is challenged?

As noted above, even if an expert's evidence is not excluded by an early application, it may still be open to the opposing party to discredit the witness at trial stage - and a late stage challenge may be even more damaging to a case.

While the common law principles regarding the independence of witnesses, as set out in the *MeatCo* case, help to illustrate the varying degrees of potentially compromised independence, the Reforms seek to minimise the risk of these complications arising.

That said, the Reforms do not go as far as recommending express declarations regarding conflicts of interest. Therefore, in the event that you anticipate a challenge in this area, following the recommended safeguards to "ring-fence" an expert heading into these troubled waters at an early stage may be advisable: full disclosure of the expert's position and any potential conflicts, suitable undertakings and (as is now compulsory in Hong Kong) a declaration of the expert's awareness of his duty to the court.

Timothy Hill, Partner
Hogan Lovells, Hong Kong
T: +852 2840 5023
timothy.hill@hoganlovells.com

If you would like further information on any aspect of this note please contact a person mentioned below or the person with whom you usually deal:

Hong Kong

Timothy Hill, Partner
timothy.hill@hoganlovells.com
+852 2840 5023

Damon So, Partner
damon.so@hoganlovells.com
+852 2840 5018

Beijing/ Shanghai

Terence Wong, Consultant
terence.wong@hoganlovells.com
+86 21 6122 3827

Singapore

Paul Teo, Consultant
paul.teo@hoganlovells.com
+65 6302 2559

Tokyo

Tony Marshall, Partner
tony.marshall@hoganlovells.com
+81 3 5157 8200

Ho Chi Minh/ Hanoi

Nasir PKM Abdul, Of Counsel
nasir.pkmabdul@hoganlovells.com
+84 8 3829 5100

Dubai

Stephen York, Consultant
stephen.york@hoganlovells.com
+971 4 377 9388