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Gough Square Chambers' consumer credit column: November 2021

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the November 2021 column, Lee Finch considers the issue of expert evidence. This is in the light of an increasing number of attempts by claimants against financial institutions to bolster even the more modest claims with expert evidence.

Expert evidence

Introduction

Whilst it has always been a distinct possibility in the larger claims, recently there has been an increasing number of attempts by those bringing claims against financial institutions to bolster even the more modest claims with expert evidence. This is particularly prevalent in misselling claims and allegations that firms have breached DISP 1.4.1R in calculating redress incorrectly.

In appropriate cases such evidence will, of course, assist the court and could go a long way to making good the claimant's case. However, more often than not, the expert evidence is either unnecessary, inaccurate, biased, lacking necessary expertise or not expert evidence at all. There is an obvious need to combat reliance on this type of "expert" evidence and there are a number of ways of doing so.

Opposing permission

Expert evidence can only be relied on with the permission of the court (CPR 35.4(1) and CPR 27.5) and, in the first instance, it is worth considering whether or not to oppose the application for such permission.

For permission to be granted, the party seeking to adduce the expert evidence must persuade the court that it will assist the court (*Clarke (Executor of the Will of Francis Bacon) v Marlborough Fine Art (London) Ltd [2002] EWHC 11 (Ch)*). Expert evidence is prima facie admissible if it is contained within an acknowledged "body of expertise" governed by recognised standard and rules of conduct relevant to the question which the court has to decide. However, the court retains a discretion to exclude such evidence if it would not assist in the determination of the issue.

In *British Airways plc v Spencer [2015] EWHC 2477 (Ch)*, the court approached the question in three stages:

- Is expert evidence necessary to decide an issue? If it is necessary, permission should be granted.
- If it is not necessary, will it assist the court in determining an issue? If it will not assist, permission should be refused.
- If it will assist, the court should ask is expert evidence on that issue reasonably required to determine proceedings?

All three questions should be approached consistently with the overriding objective and in particular, when considering the third question, the court should consider issues of cost, delay and proportionality.

Whether or not permission can be opposed will inevitably depend on the facts of each case but there are regularly good points to be made in opposing such evidence in low-value misselling claims: in the vast majority of claims, such evidence will be of assistance rather than necessary and will almost invariably be grossly disproportionate to the value of the claim (see, for example, the approach of HHJ Pearce in *Hodgson v Creation [2021] EWHC 2167(Comm)*).

Even where it is possible to oppose permission, consideration should be given to whether it is tactically advantageous to do so, especially where the financial institution may benefit from calling an expert of its own in response.

If permission is not granted, this cannot be circumvented by annexing an expert report to a witness statement (*New Media Distribution Co SEZC Ltd v Kagalovsky [2018] EWHC 2742 (Ch)*). Likewise, the court's powers to restrict expert evidence cannot be subverted by annexing an expert report to a pleading and then relying on the same without permission; although this appears to be an increasingly common tactic.

Challenging expertise

Whether at the permission stage or later (and there can be tactical advantages to doing it later), it may be possible to challenge the expertise of the expert relied on by the other side.

When junior barristers are taught how to challenge expert evidence and how to cross examine expert witnesses, one of the primary rules is "don't challenge the expert's expertise" but, like all good rules, it is made to be broken. Challenging expertise is high risk because if unsuccessful, all that has been achieved is reminding the court of the expert's qualifications and ability to assist the court. However, it is also high reward and in a number of cases is clearly the right approach.

It is not uncommon for parties in more modest financial claims to rely on what is essentially accountancy or actuarial evidence from "experts" who do not have any recognised accountancy qualification (from one of the chartered institutes or otherwise) and whose only qualification appears to be that they can complete an Excel spreadsheet in a moderately competent fashion. Likewise, "experts" with years of experience within a specialist industry are often relied on to give evidence which ought to be given by a properly qualified expert engineer.

Challenges to expertise are often met with "but [the expert] has given evidence in many cases and that evidence has been accepted by courts previously". Such vague claims should be met with scepticism and, in any event, the fact that expertise has not previously been opposed or that the "expert" has previously pulled the wool over a different court's eyes is not a qualification and cannot prevent the current court properly considering the question afresh. We are, of course, assuming that there is no higher court decision confirming that the proposed "expert" is appropriately qualified.

Challenging independence

Like challenging expertise, challenging independence comes with its fair share or warning labels. However, in some cases, the lack of independence is so blatant that it must be challenged and doing so can pay significant dividends.

By way of example, in one case I have recently dealt with, the "expert" in a misselling case had previously been the chief executive of a claims management company that had claim farmed the type of mis-selling claim as that which he was now purporting to give expert evidence in relation to. He had also referred such cases (but not this case) to the claimant's solicitors and had financially benefited from such claims. Likewise, I have also recently seen an expert's report which started with the line "I have been instructed by [the Claimant] to carry out calculations maximising the sums they can claim from [the Defendant]". Such a lack of independence ought to be challenged and can significantly undermine the evidence provided by that expert. However, it should be noted that a direct or indirect interest in the outcome of litigation is not, in and of itself, sufficient to debar the expert from giving evidence if they understand their duty to the court and can set aside their own interest to give evidence in compliance with that duty (*Gallagher International Ltd v Tlais Enterprises Ltd [2007] EWHC 464 (Comm)*).

Challenging the evidence

In addition to opposing permission and challenging independence and expertise, it is, of course, possible to dispute the underlying evidence. This can be achieved in fours ways:

- Obtaining permission and subsequently relying on your own expert who gives contrary evidence.
- Asking questions under CPR 35.6 designed to draw out difficulties with expertise, independence, underlying rationale, assumptions and conclusions.
- Seeking to undermine the expert evidence through cross examination.
- Criticising the expert report in submission and inviting the court to reject the evidence.

Helpfully, the Court of Appeal has recently confirmed that courts are permitted to reject uncontroverted expert evidence (*Griffiths v TUI UK Ltd [2021] EWCA Civ 1442*). Consequently, it is not impossible to wait until closing submissions to challenge the expert evidence, although that would likely be a high-risk strategy in many cases.

Non-compliance with the rules and Practice Direction

The quality of expert report advanced in lower value litigation is incredibly poor, not only in substance, but also in form. Reports regularly fail to comply with even the most basic rules in CPR 35 and the accompanying Practice Direction. Such breaches should be considered as, if sufficiently serious, they can amount to a reason to dismiss the expert evidence/revoke permission (see for

example *R (Good Law Project Ltd) v Secretary of State for Health and Social Care [2021] EWHC 2595 (TCC)*).

Obtaining instructions

One final point to consider when dealing with the proliferation of "expert" reports in moderate value misselling claims, and other financial disputes, is whether the instructions to the expert can be obtained. Under CPR 35.10(3), the expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. Importantly, whilst instructions to experts are not privileged against disclosure, the court will not order disclosure unless it has reasonable grounds to consider that the statement instructions given under CPR 35.10(3) is incomplete. Given that many low quality "expert" reports adduced in moderate financial claims make no attempt whatever to summarise the expert's instructions, there is often an opportunity to obtain the full instructions and the potential golden nuggets contained therein.

Gough Square Chambers' consumer credit columns

For previous consumer credit columns written by barristers at Gough Square Chambers, see Practice note, Gough Square Chambers' consumer credit column.