

# EXPERT EVIDENCE: THE NEW RULES

## INTRODUCTION

This paper considers the nature of expert evidence before turning to the criticisms made and reforms suggested by the Chief Justice's Working Party on Civil Justice Reform ("CJR") insofar as they concern its use in the Hong Kong civil courts. The paper then continues with an examination of the changes that will be brought about to the nature and role of expert evidence by virtue of the implementation of the CJR on 2 April 2009. It concludes with a summary and critique of those changes.

### 1. WHAT IS "EXPERT EVIDENCE"?

The general common law rule is that opinion evidence is inadmissible<sup>1</sup>. A witness may give evidence of those facts which are within his (or her) personal knowledge but he may not draw any inferences from those facts. Section 58 of the Evidence Ordinance<sup>2</sup> sets down two exceptions to this rule:

*1) Subject to any rules, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.*

*(2) Where a person is called as a witness in any civil proceedings a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.*

*(3) In this section, "relevant matter" includes an issue in the proceedings in question.*

Thus, under section 58(2) a lay witness may give opinion evidence on those facts which can only be conveyed in such a way e.g. someone's age ("he was old") or appearance ("he was drunk").

The more important exception, for the purposes of this paper, is that in section 58(1), by which a "qualified" person may give his opinion on any "relevant matter" that is within his area of expertise, provided that this expertise is not possessed by the court<sup>3</sup>. In that sense, then, 'expert evidence' is 'opinion evidence' given by someone who is deemed to possess expertise in or experience of the relevant subject area and whose evidence is not necessarily based on facts 'personally perceived' by him.

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<sup>1</sup> *Adams v Canon* (1621) Ley's KB Rep 68, 73 ER 117 (Coke)

<sup>2</sup> The relevant provisions of the Evidence Ordinance are based on those within the UK Civil Evidence Act 1972

<sup>3</sup> *Folkes v Chadd* (1782) 3 Doug KB 157

In the English case of *Barings plc (in liq) v Coopers and Lybrand (No. 2)*<sup>4</sup> Evans-Lombe J emphasized that the court applies a four-stage test when deciding whether to admit 'expert evidence'. The first two stages could be said to relate to the expert himself. The court must be satisfied, first, that there is a body of expertise governed by recognised rules of conduct. The second stage is that the intended witness must be deemed to be familiar with that area of expertise. The prospective witness will usually pass this second stage by possessing relevant professional qualifications and experience. Yet, the person's expertise does not necessarily need to have been acquired in a formal manner. An 'expert' is a competent expert witness provided the court considers that he has the necessary expertise, however it was obtained<sup>5</sup>. 'Paper qualifications' are not, therefore, essential.

The next two stages could, in turn, be said to relate to the court. The third requirement is that the evidence must be 'relevant' in that it will assist the court in resolving the issues before it. This was explained by Evans-Lombe J in *Barings* as "meaning 'helpful' to the Court in arriving at its conclusions". Finally, the evidence must relate to an issue which is outside the ordinary experience of the court. It will satisfy this fourth requirement if it relates to a technical or specialist subject e.g. medical science, engineering, property valuations and auditing. Returning to *Barings*, Evans-Lombe commented that "Such [expert] evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence."

It is, however, important to appreciate that not all evidence from an 'expert' is necessarily 'expert evidence'. In *Koninklijke Philips Electronics NV v Wealth Full Technology Ltd*<sup>6</sup> Deputy Judge R Tong SC stated:

*"The mere fact that factual evidence is given by someone with expertise in a particular discipline does not transform that evidence into expert or opinion evidence although sometimes the line between factual and opinion evidence may not be immediately apparent. For example, an explanation as to how a computer works may be purely descriptive and factual although it may require some expert training on the part of the person giving that explanation. On the other hand, evidence as to the quality of the work of a computer may be a matter of expert opinion"*

Finally, it should not be forgotten that section 58(1) states that the admissibility of any expert evidence is "subject to any rules". These "rules" are identified in section 60(2) as the Rules of the High Court ("RHC"). There are two provisions in the RHC that control the admission of expert evidence. First, Order 38 rule 4 provides that the court may limit that the number of medical or other expert witnesses who may be called at trial. Secondly, by Order 38 rule 36, no expert evidence may be adduced at a trial or hearing (without the court's leave or the other parties' consent) unless the party seeking to adduce that

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<sup>4</sup> [2001] PNLR 22. This case has been relied on by the Hong Kong courts on several occasions.

<sup>5</sup> *R v Silverlock* [1894] 2 QB 766

<sup>6</sup> [2002] 3 HKCFI 82 at para 16

evidence has sought and complied with the court's directions on the pre-trial disclosure of the substance of the expert evidence i.e. exchanging expert reports. These provisions should be borne in mind when considering both the comments in the CJR and the operation of the new provisions in the RHC.

## **2. THE CIVIL JUSTICE REFORMS**

### **2.1 Overview**

On 2<sup>nd</sup> April 2009, Hong Kong will implement the 'new' RHC<sup>7</sup>, which are the fulfilment of the nine-year-long CJR process.

This process began in February 2000, when the Chief Justice appointed a Working Party<sup>8</sup> to review and recommend changes to Hong Kong's civil litigation procedures. The Working Party went on to produce an Interim and Final Report on the problems with the civil courts and the ways in which these problems could be addressed. The CJR process culminated, over the course of the last year with a collection of primary and secondary legislation as follows:

- Civil Justice (Miscellaneous Amendments) Ordinance 2008 ("the Ordinance")<sup>9</sup>;
- Rules of the High Court (Amendment) Rules 2008
- Rules of the District Court (Amendment) Rules 2008
- High Court Fees (Amendment) Rules 2008
- High Court Suitors' Funds (Amendment) Rules 2008
- District Court Civil Procedure (Fees) (Amendment) Rules 2008
- District Court Suitors' Funds (Amendment) Rules 2008
- Lands Tribunal (Amendment) Rules 2008<sup>10</sup>

The Judiciary also published a set of draft Practice Directions (comprising both amended and entirely new Practice Directions) to accompany the RHC in August 2008<sup>11</sup>. Following consultations with the legal profession, a further set of drafts appeared in November 2008.

This paper does not discuss the progress of the CJR between 2000 and 2008<sup>12</sup> in detail but, before embarking on an examination of the new provisions on experts within the

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<sup>7</sup> This paper focuses on the RHC only, albeit many of the new provisions are repeated in the RDC and, indeed, one of the aims of the CJR was to eliminate the majority of the differences between the two

<sup>8</sup> The Working Party's membership is listed at p 1, para 2 of its Interim Report and Consultative Paper (IR).

<sup>9</sup> Which amended the High Court Ordinance (Cap. 4), District Court Ordinance (Cap. 336), Lands Tribunal Ordinance (Cap. 17), Small Claims Tribunal Ordinance (Cap. 338), Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) and Arbitration Ordinance (Cap. 341)

<sup>10</sup> The full text of these items and the Interim and Final Reports, together with other useful documents, can be found in the CJR website at <http://www.civiljustice.gov.hk>

<sup>11</sup> These drafts have not been made available to the general public

<sup>12</sup> In short, the CJR Working Party produced an Interim Report containing 80 Proposals for consultation in November 2001 and a Final Report with 150 Recommendations in March 2004. The Chief Justice accepted the 150 Recommendations and these were subsequently used as the basis for primary and subsidiary legislation referred to in the introduction to this commentary

RHC, it would be worth recollecting the CJR Working Party's terms of reference upon its appointment:

*“To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed.”<sup>13</sup>*

From the outset, it was accepted that the civil justice system in Hong Kong needed reform and that the ‘new’ rules should embody the necessary changes. The Interim Report consisted, in the main, of an examination of what exactly was wrong with the RHC and what could be done, in general terms, to put things right. In particular, the Interim Report identified the following ailments in the civil justice system:

- expense
- delay
- uncertainty
- “overly adversarial” practices
- a lack of equality between wealthy litigants and poorer ones
- “incomprehensible” procedures and
- a “fragmented” court administration

Despite the passage of time; the volume of work that has been carried out; and number of discussions that have been held since the publication of the Interim Report, there has been no real dispute over this diagnosis and the need for a ‘cure’. Those differences of opinion that have been expressed since 2001 have focused, instead, upon the specific cures and how to implement them. In particular, the suggestion that the English Civil Procedure Rules (“CPR”)<sup>14</sup> could be adopted in place of the RHC to provide a simple ‘cure all’ was strenuously rejected during the consultation period following the publication of the Interim Report and it was, instead, decided to amend the RHC.

## **2.2 The problem with expert witnesses**

The Working Party took the view that “The faults in the civil justice system are generally seen to be the product of distortions caused by its adversarial design”<sup>15</sup>. A consequence of this defect was a “psychology of warfare” leading to, among other things, experts acting as “partisan hired guns”.

The Interim Report elaborated on this by quoting Lord Woolf thus:

*“The purpose of the adversarial system is to achieve just results. All too often it is used by one party or the other to achieve something which is inconsistent with justice by taking advantage of the other side’s lack of resources or ignorance of*

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<sup>13</sup> Interim Report, p 1, para 1.

<sup>14</sup> The Working Party made extensive references to the CPR and to Lord Woolf’s “Access to Justice” Reports that led to the adoption of the CPR in England & Wales in 1999. The full text of the CPR can be found at [http://www.justice.gov.uk/civil/procrules\\_fin/index.htm](http://www.justice.gov.uk/civil/procrules_fin/index.htm)

<sup>15</sup> Interim Report p 10 para 26

*relevant facts or opinions. Expert evidence is one of the principal weapons used by litigators who adopt this approach.*"<sup>16</sup>

The Interim Report also referred to a report by the Australian Law Reform Commission, in which it was stated that "the use of expert evidence is [alleged to be] a source of unwarranted cost, delay and inconvenience in court and tribunal proceedings".

The Working Party took the view that the two major deficiencies with respect to expert witness evidence were:

- i. the inappropriate or excessive use of experts, which increases the cost, duration and complexity of proceedings; and
- ii. partisanship and a lack of independence amongst experts, which devalued their role in the judicial process.

The Working Party observed that, in England, the inappropriate or excessive use of experts had been addressed Lord Woolf's proposal that the court should have "complete control over the use of evidence, including expert evidence." This is reflected in CPR Part 35.1 which states:

*"Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."*

CPR Part 35.4 adds:

*"(1) No party may call an expert or put in evidence an expert's report without the court's permission.  
(2) When a party applies for permission under this rule he must identify –  
(a) the field in which he wishes to rely on expert evidence; and  
(b) where practicable the expert in that field on whose evidence he wishes to rely.  
(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2)."*

Further provisions include CPR Part 35.4(4) which allows the court to limit the amount of expert fees and expenses which one side may recover from the other. Another is CPR Part 35.6 by a party may put written questions to the other side's expert (or to the single joint expert, if one has been appointed) about his report. Yet another is CPR Part 35.14, by an expert may file a written request for directions from the court, to assist him in carrying out his work<sup>17</sup>.

The problem of 'biased' experts long predated both the CPR and the Working Party's work. The duties of experts were summarised by Cresswell J in the *National Justice Compania Naviera SA v Prudential Assurance Company Limited (The Ikarian Reefer)*<sup>18</sup>,

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<sup>16</sup> Interim Report p 182 para 486

<sup>17</sup> By CPR Part 35.14(2)(a) the expert must, however, provide a copy of the request to the party instructing him seven days in advance of filing the same with the court

<sup>18</sup> [1993] 2 Lloyds Rep 68

where His Lordship stressed the expert's need to be independent, to confine himself to his own area of expertise and to co-operate with the other side's expert(s). Despite this exhortation, the CPR contained provisions to reinforce the importance of impartiality. Most significantly, CPR Part 35.3 expressly states:

*“(1) It is the duty of an expert to help the court on the matters within his expertise.  
(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.”*

It is also possible, under CPR Part 35.10(4), to seek disclosure of an expert witness' instructions from a party (or a party's solicitors) if one suspects that the expert has been given a “steer” or his report has been tampered with by anyone<sup>19</sup>.

The Australian Federal Court's Guidelines for expert witnesses contain similar provisions on impartiality and the New South Wales rules' “Expert Witness Code of Conduct”, states:

*“An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise. An expert witness's paramount duty is to the Court and not to the person retaining the expert. An expert witness is not an advocate for a party.”<sup>20</sup>*

Another important development in England to eliminate the problems caused by arising from the use of expert evidence was the introduction of single joint experts. CPR Part 35.7 provides:

*“(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.  
(2) The parties wishing to submit the expert evidence are called ‘the instructing parties’.  
(3) Where the instructing parties cannot agree who should be the expert, the court may –  
(a) select the expert from a list prepared or identified by the instructing parties;  
or*

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<sup>19</sup> The obligations under CPR Part 35.10(3) and (4) are as follows – (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. (4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions – (a) order disclosure of any specific document; or (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete. This was considered by the Court of Appeal in *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust* [2003] 4 All E.R. 720, where it was held that all material supplied by an instructing party to an expert as the basis for providing his advice formed part of his instructions and was subject to the ambit of the rule.

<sup>20</sup> Interim Report p187 para 500

*(b) direct that the expert be selected in such other manner as the court may direct.”*

This expert is not a court-appointed expert. The parties select the expert and the CPR leaves his instruction and remuneration to them. The Working Party opined that:

*“it seems clear that where single joint expert directions are appropriately given, the parties are likely to benefit and the court to be better served by independent and reliable expert assistance. Partisan conflicting views are avoided and only one set of fees and expenses incurred. These are important benefits making the single joint expert innovation one that clearly merits consideration for adoption”<sup>21</sup>*

### **2.3 CJR Recommendations**

The following Recommendations were contained in the Working Party’s Final Report and accepted by the Chief Justice -

#### *Recommendation 103*

A rule along the lines of CPR 35.10(2) combined with Part 36 of the NSW rules should be adopted, making it a requirement for the reception of an expert report or an expert’s oral testimony that (a) the expert declares in writing (i) that he has read the court-approved Code of Conduct for Experts and agrees to be bound by it, (ii) that he understands his duty to the court, and (iii) that he has complied and will continue to comply with that duty; and (b) that his expert report be verified by a statement of truth.<sup>22</sup>

#### *Recommendation 104*

A Code and a Declaration for Expert Witnesses, approved by the court as envisaged in the preceding Recommendation, should be adopted after consultation with interested parties initiated on the basis of a draft code adapted from the Academy of Experts’ codes set out in Appendix 3 to this Final Report.<sup>23</sup>

#### *Recommendation 107*

The court should be given power to order the parties to appoint a single joint expert upon application by at least one of the parties, subject to the court being satisfied, having taken into account certain specified matters, that the other party’s refusal to agree to a SJE is unreasonable in the circumstances.<sup>24</sup>

Other Proposals in the Interim Report for, among other things, the adoption of CPR Part 35.4(4) and CPR Part 35.6 were rejected by consultees and therefore not recommended in the Final Report. Some provisions, such as CPR Part 35.14, were rejected as being both

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<sup>21</sup> Interim Report page 192 para 518

<sup>22</sup> Final Report page 324

<sup>23</sup> Final Report page 325

<sup>24</sup> Final Report page 335

potentially divisive and as precipitating the need to appoint two sets of experts i.e. one that gives evidence in court and one that is the party's 'consultant', with a consequent adverse effect on costs<sup>25</sup>. Much reliance was placed in the Final Report on the views of the UK Academy of Experts<sup>26</sup>, which were critical of much of CPR Part 35<sup>27</sup>.

### 3. THE 'NEW' ORDER 38

#### 3.1 The expert witness

Order 38 rule 35(2) has been amended so that it now states:

*"A reference to an expert witness in this Part or Appendix D is a reference to an expert who has been instructed to give or prepare evidence for the purpose of proceedings in the Court"*

The text of this rule is an exact copy of CPR Part 35.2 and its effect is to create a distinction between an 'expert' and an 'expert witness'. Whereas an 'expert' is someone who can presumably satisfy the first two stages of the *Barings* test and can advise a party on a specialist or technical matter, he does not give evidence to the court and is therefore outside the scope of Order 38 (i.e. he is a 'consultant' in other words). An 'expert witness' on the other hand is someone who has been specifically instructed to give evidence on behalf of a party and who will usually prepare a written report for the court. It is 'expert witnesses' with whom Order 38 (and other relevant provisions of the RHC) is concerned<sup>28</sup>.

This distinction has, hitherto, not been expressly stated in Hong Kong. In England, it has been clear since the adoption of CPR Part 35.2 and the general view is that 'experts' can be retained by parties and that, provided it meets the appropriate criteria, their communications with that party and its lawyers will be privileged from disclosure. This means that such 'experts' are able to assist the party instructing them in developing the case. For example, they may be asked to consider the following:

- the content of the pleadings;
- points to be covered in the witness statements;
- questions to ask when cross-examining the other side's witnesses;
- submissions to be made by counsel;
- instructions and questions for a single joint expert, if one has been appointed.

The drawback of retaining such an 'expert' is that it may be difficult to recover the costs of instructing him from the other side in taxation, whereas those of an 'expert witness' would usually be recoverable. One method of avoiding this difficulty was addressed in *R.*

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<sup>25</sup> This problem has, however, not been avoided by the rejection of CPR Part 35.14., as is seen from the discussion of the implications of the adoption of CPR Part 35.2

<sup>26</sup> The Academy's website is <http://www.academy-experts.org/>

<sup>27</sup> Final Report, Section 20 – Expert evidence, pages 313-335

<sup>28</sup> See Dwyer, D, *The Effect of the Fact/Opinion Distinction on CPR r. 35.2: Kirkman v Euro Exide Corporation [2007] EWCA CIV 6'* (2008) 12 International Journal of Evidence and Proof 141 for a discussion of this distinction

(on the application of *Factortame & others*) v *Secretary of State for Transport, Environment & the Regions* (No. 2)<sup>29</sup> where the plaintiffs sought to recover their forensic accountants' fees, which had been charged as "8% of the final settlement received". The UK Government (N.B. the defendant) argued that this fee agreement was champertous<sup>30</sup> and unenforceable and that the plaintiffs were not entitled to recover, as costs, any sums paid under it. It was also alleged to be in breach of section 58 of the Courts and Legal Services Act 1990, which permits 'conditional fee agreements', but not pure contingency fees, on a limited basis in English litigation<sup>31</sup>. The Court of Appeal allowed the plaintiffs to recover the fees from the UK Government as the forensic accountants had not been retained to give evidence. They had, instead, carried out "support work" for the fishing industry experts who actually did give evidence in court. The agreement between the forensic accountants and the plaintiffs lacked the characteristics that would have rendered it champertous. It was also outside the scope of section 58, which is only concerned with agreements for the provision "advocacy or litigation services" by those persons with the right to conduct litigation or with rights of audience i.e. barristers and solicitors, not forensic accountants.

Practically speaking, there will be few occasions when a party can afford to pay for two sets of experts i.e. an 'expert' consultant and an 'expert witness'. This aside, the leading

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<sup>29</sup> [2002] 3 WLR 1104

<sup>30</sup> Champerty is a variety of maintenance. A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without a just cause or excuse. Champerty is when that person does so for a share of the damages.

<sup>31</sup> The full text of section 58 is as follows - (1) In this section "a conditional fee agreement" means an agreement in writing between a person providing advocacy or litigation services and his client which— (a) does not relate to proceedings of a kind mentioned in subsection (10); (b) provides for that person's fees and expenses, or any part of them, to be payable only in specified circumstances; (c) complies with such requirements (if any) as may be prescribed by the Lord Chancellor; and (d) is not a contentious business agreement (as defined by section 59 of the [1974 c. 47.] Solicitors Act 1974). (2) Where a conditional fee agreement provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not a conditional fee agreement, it shall specify the percentage by which that amount is to be increased. (3) Subject to subsection (6), a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement. (4) In this section "specified proceedings" means proceedings of a description specified by order made by the Lord Chancellor for the purposes of subsection (3). (5) Any such order shall prescribe the maximum permitted percentage for each description of specified proceedings. (6) An agreement which falls within subsection (2) shall be unenforceable if, at the time when it is entered into, the percentage specified in the agreement exceeds the prescribed maximum permitted percentage for the description of proceedings to which it relates. (7) Before making any order under this section the Lord Chancellor shall consult the designated judges, the General Council of the Bar, the Law Society and such other authorised bodies (if any) as he considers appropriate. (8) Where a party to any proceedings has entered into a conditional fee agreement and a costs order is made in those proceedings in his favour, the costs payable to him shall not include any element which takes account of any percentage increase payable under the agreement. (9) Rules of court may make provision with respect to the taxing of any costs which include fees payable under a conditional fee agreement. (10) The proceedings mentioned in subsection (1)(a) are any criminal proceedings and any proceedings under - (a) the [1973 c. 18.] Matrimonial Causes Act 1973; (b) the [1976 c. 50.] Domestic Violence and [1984 c. 42.] Matrimonial Proceedings Act 1976; (c) the [1976 c. 36.] Adoption Act 1976; (d) the [1978 c. 22.] Domestic Proceedings and Magistrates' Courts Act 1978; (e) sections 1 and 9 of the [1983 c. 19.] Matrimonial Homes Act 1983; (f) Part III of the [1984 c. 42.] Matrimonial and Family Proceedings Act 1984; (g) Parts I, II or IV of the [1989 c. 41.] Children Act 1989; or (h) the inherent jurisdiction of the High Court in relation to children.

authority in Hong Kong on the law of maintenance and champerty is the Court of Final Appeal decision in *Unruh v Seeberger*<sup>32</sup>, in which the views expressed on the nature of conditional fees and champerty in *Factortame* were approved of, insofar as they related to those actually involved in the litigation. Accordingly, the Hong Kong courts can be expected to take a 'relaxed' approach with regard to the remuneration of 'experts'. Finally, in this respect, it is worthwhile noting that in *Tang Ping-Choi v The Secretary for Transport*<sup>33</sup> the Court of Appeal took the view that:

*"...although an expert witness may be employed by a party to the litigation and/or may have undertaken activities which are inappropriate to his position, it is not the case that the entirety of his evidence is "tainted" thereby rendering it automatically inadmissible"*

### **3.2 The duties of an expert witness**

As already noted, in *The Ikarian Reefer*, Cresswell J gathered together judicial guidance on the conduct expected of experts. This included the following:

- "1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v. Jordan, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).*
- 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd. v. Commercial Union Assurance Co. Plc., [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
- 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup.).*
- 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. and Others v. Weldon and Others, The Times, Nov. 9, 1990 per Lord Justice Staughton).*
- 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*

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<sup>32</sup> [2007] 10 HKCFAR 31

<sup>33</sup> [2004] HKCA 127

*7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports”*

The existence of such judicial comments did not, as already noted, prevent experts from neglecting their duties in England (or in Hong Kong). Thus the duty was reiterated by the introduction of CPR Part 35.3 and, from April 2009, a new Order 38 rule 35A will state:

*“(1) It is the duty of an expert witness to help the Court on the matters within his expertise.*

*(2) The duty under paragraph (1) overrides any obligation to the person from whom the expert witness has received instructions or by whom he is paid.”*

It will be apparent that these words replicate those of CPR Part 35.3. Unfortunately, even the introduction of CPR Part 35.3 did not lead to a change in the behavior of some expert witnesses (or those advising them). For example, in *Pearce v Ove Arup Partnership Limited (Copying)*<sup>34</sup>, the judge deemed an expert witness to be biased and even irrational and reported him to his professional body. In *SPE International Ltd v Professional Preparation Contractors (UK) Ltd*<sup>35</sup> Rimmer J was especially scathing of a so-called expert in case concerning copyright infringement. A Mr Glew had been in partnership with the plaintiff (SPE) for designing and producing shot-blasting machinery. He subsequently left to work for a competitor (the first defendant) which then produced and marketed a shot-blasting machine that was similar in design to SPE's prototype. Rimmer J's comments on Mr Dean, the expert witness, were damning:

*“Mr Dean's main difficulty is that he has no relevant expertise. He is an ex RAF officer, who no doubt has a specialised knowledge and experience of many fields of human endeavour, but they do not include the field of shot blasting...”*

*Although Mr Dean's report is described as prepared by him, it in fact purports to be the report of an organisation called “DMC”, which is a consultant agency run by Mr and Mrs Dean...*

*Mr Dean made no note of the instructions he was given, because he said there was no need - he said he had a fairly good memory. There is no record of any instructions he was ever given, and he said he did not make one because no-one told him he should do so. He wrote letters seeking information supposedly relevant to his report, but did not think to keep copies of them - since no-one told him to... Mr Dean's ignorance in what was required of him was compounded by the fact that, until he gave evidence, he had never heard of, let alone read, Part 35 of the CPR... As a result, he approached and performed his task with manifest incompetence”*

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<sup>34</sup> (2002) 25(2) IPD 25011

<sup>35</sup> [2002] EWHC 881

Fortunately, such demonstrations of a complete disregard of both *The Ikarian Reefer* and CPR Part 35 are fairly rare but they are not uncommon. Of far greater concern is the question of “independence”. The fact that an expert has a conflict of interest (e.g. he is employed by one of the parties) should not prevent him from giving evidence, as can be seen from the *Tang Ping Choi* decision. This was also stated to be the case by the English Court of Appeal in *Toth v Jarman*<sup>36</sup>. The real question is whether the conflict prevents the expert remaining independent. One way of determining this is to ask if the expert witness would have written the same report or given the same opinion if he had been instructed by another party<sup>37</sup>.

In order to address such concerns, the English authorities produced a code of conduct for experts and those advising them, which is annexed to CPR Practice Direction 35 as the “Protocol for the Instruction of Experts to give evidence in Civil Claims”. This Protocol gives clear guidance to those who instruct experts and experts themselves as to what they are expected to do in civil proceedings. The Protocol draws upon earlier documents produced by the Academy of Experts and the Expert Witness Institute, as well as suggestions made by the Clinical Dispute Forum<sup>38</sup>. It was approved by the Master of the Rolls and has been applied since 5 September 2005. At Appendix D to the RHC there is a new “Code of conduct for expert witnesses” (the Code) which is intended to perform a similar function.

### 3.3 The Code

A new Order 38 rule 37B(1) contains the following obligation upon those instructing expert witnesses:

- “(1) A party who instructs an expert witness shall as soon as practicable provide the expert witness with a copy of the code of conduct set out in Appendix D.*
- (2) Where the Court has under rule 4A(1) ordered that 2 or more parties shall appoint a single joint expert witness, paragraph (1) applies to each of the parties.*
- (3) If the instruction is in writing, it must be accompanied by a copy of the code of conduct set out in Appendix D”*

A new Order 38 rule 37C goes on:

- “(1) An expert report disclosed under these rules is not admissible in evidence unless the report contains a declaration by the expert witness that –*
- (a) he has read the code of conduct set out in Appendix D and agrees to be bound by it;*
- (b) he understands his duty to the Court; and*

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<sup>36</sup> [2006] 4 All ER 1276

<sup>37</sup> Pugh, C & Pilgerstorfer, M *Expert Evidence: The Requirement Of Independence* J.P.I. Law 2008, 3, 224-238

<sup>38</sup> The full text of the Protocol can be seen (as a separate pdf document) in the CPR website at [http://www.justice.gov.uk/civil/procrules\\_fin/contents/form\\_section\\_images/practice\\_directions/pd35\\_pdf\\_eps/pd35\\_prot.pdf](http://www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf)

- (c) he has complied with and will continue to comply with that duty.*
- (2) Oral expert evidence is not admissible unless the expert witness has declared, whether orally or in writing or otherwise, that –*
- (a) he has read the code of conduct set out in Appendix D and agrees to be bound by it;*
- (b) he understands his duty to the Court; and*
- (c) he has complied with and will continue to comply with that duty.*
- (3) Paragraph (1) does not apply to a report that was disclosed under rule 37 before the commencement of this rule”*

As to the Code itself, paragraph 1 states unambiguously that it is to apply to all experts who have been instructed to give or prepare evidence for the purpose of proceedings in the courts. Paragraphs 2 to 4 reiterate that the expert witness’s duty is to the court and not to those instructing (or paying) him; he is to act impartially and independently; and that he is not an advocate for any party. The Code thus reinforces Order 38 rule 35A

Paragraphs 5 and 6 repeat the provisions in Order 38 rule 37C that an expert’s report or his oral evidence will not be admitted unless he includes a declaration in his report, or makes a separate declaration in writing, that he has read, understands and will comply with the Code.

Under Order 38 rule 37A an expert’s report must be verified by a statement of truth in accordance with Order 41A and this requirement is repeated at paragraph 7 of the Code. Paragraphs 8 to 11 set out what must be included in the report, including the person’s qualifications as an expert; the facts, matters and assumptions on which the opinions in the report are based; and whether the report may be incomplete or inaccurate without some qualification (and what that qualification is). Of particular interest is paragraph 11 which states that an expert who changes his opinion on a material matter should prepare and provide the party instructing him with a supplementary report. What is not clear, however, is whether that report is privileged or what the party is to do with it.

Paragraphs 12 and 13 require experts to abide by any direction by a court to attend an experts’ conference and to “exercise [their] independent, professional judgment in relation to such a conference” and in the production of any subsequent joint report.

The Code concludes with a note that proceedings for contempt of court may be brought against anyone who makes a false declaration or a false statement in a document verified by a statement of truth without an honest belief in its truth.

### **3.4 Single Joint Experts**

The most significant change in respect of expert evidence is found at the new Order 38 rule 4A by which the court may order two (or more) parties to appoint a single joint expert witness to give evidence on any particular question. This is not a court-appointed expert as provided for under Order 40, it is a new concept and is based on CPR Part 35.7. The first reason for appointing a single joint expert is that it saves time and costs. These

savings are unlikely to be significant, however, if the parties have already appointed their own ‘experts’ (i.e. consultants and, presumably, prospective expert witnesses). In some cases, an expert will have been instructed well before the commencement of proceedings to advise on liability and quantum.

The second reason<sup>39</sup> is that a single joint expert is, potentially, more independent and objective than one who has been appointed by one of the parties. Even if that party and its advisers abide by *The Ikarian Reefer*, Order 38 rule 35A and the Code, it will remain the case that the expert will receive all his instructions and all his information on the case (including the answers to any questions he may have) from just one party. He will have little, if any, contact with the other side before trial except for, perhaps, a “without prejudice” meeting with its expert witness. His only other meaningful contact will be when he is cross-examined at the trial. Such an isolated position is almost bound to influence his view of the case.

Turning to the new provisions in the RHC, Order 38 rule 4A(1) states the following:

*“In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, order 2 or more parties to the action to appoint a single joint expert witness to give evidence on that question”*

Further, by Order 38 rule 4A(3):

*“Where an order is made under paragraph (1), the Court may give such directions as it thinks fit with respect to the terms and conditions of the appointment of the joint expert witness, including but not limited to the scope of instructions to be given to the expert witness and the payment of the expert witness’s fees and expenses”*

It is likely that such an order for the appointment of a single joint expert will be given when the court sets down the case management timetable pursuant to the new Order 25<sup>40</sup>. Instead of the plaintiff being required to take out a summons for directions within one month of the close of pleadings under the old rule 1(1)(b)), the new rules 1(1), (1A) and (1B) require the parties to complete a “Timetabling Questionnaire” and serve and file the same within 28 days after the close of pleadings. The form and contents of this Timetabling Questionnaire are set out in Annex A to a new “Practice Direction for Order 25 – Case Management”. It covers, among other things, expert evidence – specifically the number, identity and field(s) of expertise of any expert witnesses.

It is expected that the parties should be able to agree on the identity of any single joint expert but, if not, Order 38 rule 4A(2) provides as follows:

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<sup>39</sup> Albeit it is arguably a more important reason

<sup>40</sup> Order 25 has been extensively rewritten to replace the “Summons for directions” with a “Case management summons and conference”. This is not merely a cosmetic change but, in some ways, a statement of intent given that all further references to the old summons for directions have also been deleted.

*“Where the parties cannot agree on who should be the joint expert witness, the Court may –  
(a) select the expert witness from a list prepared or identified by the parties; or  
(b) direct that the expert witness be selected in such manner as the Court may direct”*

Of particular importance is Order 38 rule 4A(4) by which the court may appoint such a single joint expert, even if “a party to the action disagrees with the appointment” provided that it is satisfied that “it is in the interests of justice to do so after taking into account all the circumstances of the case”. Order 38 rule 4A(5) explains that these “circumstances” include but are not limited to:

- i. whether the issues requiring expert evidence can readily be identified in advance;
- ii. the nature of those issues and the likely degree of controversy attaching to the expert evidence in question;
- iii. the value of the claim and the importance of the issue on which expert evidence is sought, as compared with the cost of employing separate expert witnesses to give evidence;
- iv. whether any party has already incurred expenses for instructing an expert who may be asked to give evidence as an expert witness in the case; and
- v. whether any significant difficulties are likely to arise in relation to –
  - a. the choosing of the joint expert witness;
  - b. the drawing up of his instructions; or
  - c. the provision to him of the information and other facilities needed to perform his duties

Order 38 rule 4A(6) adds, however, that if a party disagrees with the appointment of a single joint expert, he shall have “a reasonable opportunity to appear before the Court and to show cause why the order should not be made” before the court makes its decision. Finally, Order 38 rule 4A(7) states:

*“ Where the Court is satisfied that an order made under paragraph (1) is inappropriate, it may set aside the order and allow the parties concerned to appoint their own expert witnesses to give evidence”*

It seems then that the parties have two opportunities to object to or avoid the imposition of a single joint expert. The first is at the “case management timetable” directions stage and the second, based on the words “set aside” in Order 38 rule 4A(7), would appear to be after the receipt of the single joint expert’s report.

In respect of the first opportunity, there are a number of English cases relating to parties’ objections to the appointment of single joint experts from which some useful guidance may be gleaned on the possible operation of the regime in Hong Kong. In *S (a minor) v Birmingham Health Authority*<sup>41</sup> the court ordered that a single joint expert was to be appointed in relation to a clinical negligence claim. The plaintiff successfully appealed

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<sup>41</sup> [2001] Lloyd’s Rep Med 382

this decision and obtained the appointment of its own expert witness on the basis that the issues to be covered by the expert witness' report were so important to the outcome of the case that each of the parties should have their own expert witnesses.

Generally speaking, the view is that single joint experts should be appointed when and where there is a well-established and relatively uncontested body of expert knowledge whereas the parties should be permitted to have their own expert witnesses if there is a range of differing views in the relevant field of expertise. The English courts are more likely to permit the parties to instruct their own expert witnesses in substantial and complex claims, where the central issues are technical in nature, but it is becoming increasingly common for single joint experts to be appointed in all but these types of case. In *Watson v North Tyneside MBC*<sup>42</sup> it was held that the complexity of claim, not quantum, was the predominant factor for appointing single joint expert.

In *Peet v Mid-Kent Healthcare Trust*<sup>43</sup>, a medical negligence case involving the birth of twins, the parties were permitted to call their own experts on the medical issues but there was a 'team' of seven non-medical experts who were jointly instructed to give evidence on quantum. Lord Woolf, who gave the leading judgment in the Court of Appeal, commented "In the absence of special circumstances, evidence by a single expert witness is the appropriate course to be adopted when giving directions in a case of this nature as to non-medical experts". Another important point made in *Peet* was that a single joint expert should be trusted by both the parties. Hence, a single joint expert should not attend a meeting to discuss the report with just one party, unless all the parties have agreed in writing or the court has directed that such a meeting may be held.

The Queen's Bench Guide also provides helpful advice:

*"7.9.5 In many cases it is possible for the question of expert evidence or one or more of the areas of expert evidence to be dealt with by a single expert. Single experts are, for example, often appropriate to deal with questions of quantum in cases where primary issues are as to liability. Likewise, where expert evidence is required in order to acquaint the court with matters of expert fact, as opposed to opinion, a single expert will usually be appropriate. There remain, however, a body of cases where liability will turn upon expert opinion evidence and where it will be appropriate for the parties to instruct their own experts. For example, in cases where the issue for determination is as to whether a party acted in accordance with proper professional standards, it will often be of value to the court to hear the opinions of more than one expert as to the proper standard in order that the court becomes acquainted with a range of views existing upon the question and in order that the evidence can be tested in cross-examination."*<sup>44</sup>

The Guide adds that:

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<sup>42</sup> [2003] C.L.Y. 284

<sup>43</sup> [2002] 1 WLR 210

<sup>44</sup> <http://www.hmcourts-service.gov.uk/cms/11563.htm>

*“7.9.6 It will not be a sufficient ground for objecting to an order for a single joint expert that the parties have already chosen their own experts. An order for a single joint expert does not prevent a party from having his/her own expert to advise him, though that is likely to be at his/her own cost, regardless of the outcome.”*

What about where a party is not happy with a single joint expert’s report? In *D (A Child) v Walker*<sup>45</sup> it was held that appointing a single joint expert witness was the “correct approach”. If, however, there were good reasons to allow a party to obtain further evidence before deciding whether to challenge that joint report (or part of it), the court should grant its request to instruct another expert witness. If however the damages claimed were “modest”, the court should, instead, only allow that party to “put a question to the expert who has already prepared the report”.. It was added that “good reasons” and not “fanciful reasons” would need to be provided to justify the instruction of an additional expert<sup>46</sup>.

In *Cosgrove v Pattison*<sup>47</sup>, a case involving a boundary dispute, Neuberger J (as he then was) followed *D (A Child) v Walker* and allowed one of the parties to call an additional expert when that party suggested that the single joint expert might be biased. He commented as follows:

*“ In my judgment although it would be wrong to pretend that this is an exhaustive list, the factors to be taken into account when considering an application to permit a further expert to be called are these. First, the nature of the issue or issues; secondly, the number of issues between the parties; thirdly, the reason the new expert is wanted; fourthly, the amount at stake and, if it is not purely money, the nature of the issues at stake and their importance; fifthly, the effect of permitting one party to call further expert evidence on the conduct of the trial; sixthly, the delay, if any, in making the application, seventhly, any delay that the instructing and calling of the new expert will cause; eighthly, any other special features of the case; and, finally, and in a sense all embracing, the overall justice to the parties in the context of the litigation”*

By contrast in *Popek v National Westminster Bank*<sup>48</sup> the plaintiff sought permission to appeal against an order, made on the third day of a trial, striking out his claim on the basis that no reasonable grounds for bringing the claim had been disclosed<sup>49</sup>. The claim was for breach of contract, negligence and breach of fiduciary duty in relation to a construction project. A single joint expert had been instructed to give evidence on the defendant's advice and financial arrangements. The trial judge accepted the joint expert's

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<sup>45</sup> [2000] 1 W.L.R. 1382 CA

<sup>46</sup> It is worth noting that Lord Woolf, the author of the “Access to Justice” reports that led to the CPR, gave the leading judgments in both *Peet* and *D(A Child) v Walker*

<sup>47</sup> [2001] CPLR 177

<sup>48</sup> [2002] EWCA Civ 42

<sup>49</sup> CPR Part 3.4(2)(a) states “The court may strike out a statement of case (i.e. a pleading) if it appears to the court- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim”

evidence without allowing the plaintiff to cross-examine her. The Court of Appeal held that the judge was entitled to both strike out the claim on the basis of the joint expert's report and to refuse cross-examination by the plaintiff as he could have put written questions to the joint expert in advance of trial.

Finally, if no additional evidence is permitted and the only expert evidence at trial is that of the single joint expert, what about cross-examination? In *Peet v. Mid-Kent Healthcare Trust*, the Court of Appeal held that, normally, there should be no need for a single joint expert's report to be "amplified or tested by cross-examination". If, however, it needed amplification or a party wished to subject it to cross-examination, the court had a discretion to order the same but the process should be "restricted". A similar view, as already noted, was expressed in *D(A Child) v Walker*.

### **3.5 Statement of truth**

By Order 38 rule 37A every expert report is to be verified by statement of truth in accordance with Order 41A rule 2.

The form of the statement of truth is prescribed by Order 41A rule 5(2):

*"I believe that the facts stated in this [name document being verified] are true and (if applicable) the opinion expressed in it is honestly held"*

The statements of truth in expert reports must be signed by their makers. An expert report that is not verified by a statement of truth is not admissible in evidence unless otherwise ordered by the Court (Order 41A rule 7). The court may also order a person who has failed to verify a document to do so. Finally, proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth (Order 41A rule 9).

## **4. SUMMARY AND CRITIQUE**

It can be seen that the new Order 38 (and Appendix D) implements the three substantive recommendations in the Working Party's Final Report, namely:

Recommendation 103 - a rule that, firstly, the expert declares in writing that he has read a court-approved code of conduct for experts and agrees to be bound by it; that he understands his duty to the court and will comply with that duty. Also, expert reports to be verified by a statement of truth.

Recommendation 104 - a code and a declaration for expert witnesses

Recommendation 107 - the court has the power to order the parties to appoint a single joint expert

Unfortunately, Proposals 39(d) and (e) in the Interim Report did not become Recommendations in the Final Report nor make it to the RHC. These were:

*“(d) Requiring expert reports prepared for use by the court to state the substance of all material instructions conveyed in any form, on the basis of which the report was prepared, abrogating to the extent necessary, any legal professional privilege attaching to such instructions, but subject to reasonable restrictions on further disclosure of communications between the party and such expert.*

*(e) Permitting experts to approach the court in their own names and capacity for directions without notice to the parties, at the expense of one or all of the parties, as directed by the court.”*

Proposal 39(d) was objected to on the basis that it would indeed abrogate legal professional privilege and raise the possibility of parties having to retain a second set of experts. Others argued that such a rule was unnecessary since (what became) Recommendations 103 and 104 would make it difficult for “a respectable expert” to make the required declaration or to verify his report with a statement of truth if his opinion had been subverted by those retaining him. These objections do, of course, miss the point that the Proposal, which is based on CPR Part 35.10(4), is designed to deal with those individuals who are not “respectable” experts.

A more valid concern was that such a provision could infringe Article 35 of the Basic Law<sup>50</sup>. It is submitted that this concern is misplaced. Firstly, in the nine years since it was introduced, CPR 35.10(4) has not been found to infringe the general rights to a fair trial and privacy conferred by Articles 6 and 8 of the European Convention on Human Rights. It is therefore difficult to see how it would undermine the similar, albeit more tightly worded, right protected by Article 35. Further, Article 35 is designed to protect Hong Kong residents’ right to “confidential legal advice”. Expert witnesses do not provide legal advice and, moreover, their duty is to the court not to the parties. The argument against the adoption of Proposal 39(d) is therefore, by a logical extension, an argument against *The Ikarian Reefer* and the new Order 38 rule 35A<sup>51</sup>.

Proposal 39(e), based on CPR Part 35.14, was objected to because, among other reasons, it would “inject distrust between a party and his lawyers on the one hand and the experts on the other”; it was not transparent; and was likely to erode legal professional privilege. The Final Report noted that the UK Academy of Experts had advised that CPR Part 35.14 had been amended (since the Interim Report) so that experts now serve a copy of their proposed request for directions on the parties. Having said this, the Academy of Experts felt that the provision was unnecessary save as “a measure of last resort”. The Working

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<sup>50</sup> The text of which is “Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies .....”

<sup>51</sup> See Edis, *A Privilege and immunity: problems of expert evidence* C.J.Q. 2007, 26(Jan), 40-56 for an argument that legal professional privilege ought not to apply to communications between an expert witness and the party calling the expert.

Party, in light of the objections from the Law Society, Bar Association and other ‘dispute resolution professionals’, grabbed at this comment as justification for reversing their earlier support for Proposal 39(e).

The Working Party also decided not to recommend the adoption of:

- i. CPR Part 35.4(4) - giving the court power to cap recoverable expert fees;
- ii. CPR Part 35.6 - allowing a party one chance to put written questions to an expert to clarify his report; and,
- iii. CPR Part 35.9 - enabling a party access to information held by the other side but not reasonably available to himself.

This was on the basis of the Academy of Expert’s submission that CPR Part 35.4(4) is not used in practice; that CPR Part 35.6 is “a useful power” but is often misused; and CPR Part 35.9 is rarely used since the information needed is generally obtained through discovery.

With respect, this is the opinion of one institution only and, with the exception of CPR 35.9, does not reflect the experience of many practitioners. CPR Part 35.4(4) was used in *Kranidotes v Paschali*<sup>52</sup> to limit the fee of an accountant single joint expert. The court then terminated that expert’s instructions when his quoted fee far exceeded the value of the claim. CPR Part 35.6 is very useful, especially in complex cases and the courts have been vigorous at clamping down on attempted abuses<sup>53</sup>. Further, a survey of litigation solicitors was carried out by Smith & Williamson in 2002, which discovered that only 64% of them had taken advantage of CPR 35.6 and, of those, 91% found it “useful”<sup>54</sup>. This survey, carried out at about the same time as the Academy of Experts would have prepared its comments for the CJR Working Party, does not suggest widespread abuse of the rule. It should also be noted that an equivalent of CPR Part 35.6 has been adopted in Singapore (Order 40A r.4) and that the NSW Uniform Civil Procedure Rules enable parties to seek limited clarification of a single joint expert’s report (rule 31.41).

A more significant practical problem may arise, however, in relation to something which has been included in Order 38. As already observed, Order 38 rule 4A is based on CPR Part 35.7, whereby the English courts have the power to direct that evidence is to be given by a single joint expert only. As under Order 38 rule 4A, the court may select an expert from a list prepared or identified by the parties, or direct that the expert be selected in some other manner as the court may direct. Unfortunately, Order 38 rule 4A stops there and the RHC do not contain the equivalent of CPR Part 35.8 which states:

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<sup>52</sup> [2001] EWCA Civ 357

<sup>53</sup> See the following passage of the Admiralty and Commercial Court Guide - “H2.19 (b) The court will pay close attention to the use of this procedure [CPR 35.6] (especially where separate experts are instructed) to ensure that it remains an instrument for the helpful exchange of information. The court will not allow it to interfere with the procedure for an exchange of professional opinion at a meeting of experts, or to inhibit that exchange of professional opinion. In cases where (for example) questions that are oppressive in number or content are put, or questions are put for any purpose other than clarification of the report, the court will not hesitate to disallow the questions and to make an appropriate order for costs against the party putting them.”

<sup>54</sup> [www.legalweek.com/Articles/111840/A+meeting+of+minds.html](http://www.legalweek.com/Articles/111840/A+meeting+of+minds.html)

- (1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.*
- (2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.*
- (3) The court may give directions about—*
  - (a) the payment of the expert's fees and expenses; and*
  - (b) any inspection, examination or experiments which the expert wishes to carry out.*
- (4) The court may, before an expert is instructed—*
  - (a) limit the amount that can be paid by way of fees and expenses to the expert; and*
  - (b) direct that the instructing parties pay that amount into court.*
- (5) Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.*

The supporting CPR Practice Direction 35 and “Protocol for the Instruction of Experts to give evidence in Civil Claims” provide further guidance on the selection, instruction and conduct of single joint experts. There is NO such guidance in Order 38 nor in the Code at Appendix D to the RHC. This is a major failing of the new rules as, at the very least, it leaves such matters to the unguided discretion of the courts.

Finally, in respect of the Code, whilst there is much to be said for brevity, it is too brief. The opportunity has been lost for providing further guidance on such matters as the conduct of experts instructed only to advise; the responsibilities of those instructing experts; the withdrawal of experts from the proceedings; and the possible attendance of the parties (and their legal advisers) at discussions between experts. In respect of the last of these issues, there appears to have been little attention given to the use in Australia of concurrent expert evidence, known as ‘hot tubbing’, involving a session at which expert evidence is put forward, during a joint discussion between experts, judge and lawyers<sup>55</sup>.

The results of these and other omissions may be costly satellite litigation, defeating the whole purpose of the reforms.

**GM 15.12.08**

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<sup>55</sup> Edmond, G *Secrets Of The "Hot Tub": Expert Witnesses, Concurrent Evidence And Judge-Led Law Reform In Australia* C.J.Q. 2008, 27(1), 51-82