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Part 35...”*

Lord Justice Jackson

Experts - don't forget your towel and bathing suit?

With the awareness of global climate change and the requirement for saving energy and preventing waste in every walk of life I have had the benefit of seeing a pilot application of the use of **concurrent evidence**.

During a recent case being heard at the TCC I was invited by a colleague to attend a short session during a hearing and witness at first-hand the phenomenon colloquially referred to as “Hot-tubbing” where the two Engineering experts were being questioned by the court at the same time. After some brief research it seems this practice has been brought over from Australia where it is common practice as a means to save court time and costs.

I discovered the reason for the adoption of this practice, in a short paragraph included within Lord Justice Jackson's report published in early 2010 in which it stated in subsection 3:12 under the heading of Concurrent Evidence “I have received a large number of comments on the issue of “hot tubbing”, as canvassed in PR (Preliminary Report) paragraph 42.14.2. Broadly speaking respondents fall into three camps, namely (a) outright opposition, (b) general support and (c) cautious support subject to a pilot. In addition, an Australian judge has written to say that, although “hot tubbing” is a term used by many practitioners, the correct name for the procedure is “concurrent evidence.”

In the foreword to his report Lord Justice Jackson articulated his objective as being “In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.”

Amongst the recommendations within the report Lord Justice Jackson suggested that “The procedure developed in Australia, known as “concurrent evidence” should be piloted in cases where all parties consent. If the results of the pilot are positive, consideration should be given to amending CPR Part 35 to provide for use of that procedure in appropriate cases.”

The process of hot tubbing, as I understand it, proceeds as follows: experts from the same discipline are sworn in at the same time and the judge chairs a discussion between the experts. The joint statement from the experts recording the matters upon which they disagree serves as the agenda. Counsel joins in the discussion and they can put questions to the experts, as and when permitted by the judge. Equally the experts can put questions to each other.

In essence the goal of the practice is to speed the process of providing expert witness evidence and consequently reduce costs. This approach would certainly appear to save court time and costs but in my experience and from the opinions echoed by others, it does not address the period where the majority of expert costs are incurred, this being the preparation of the expert reports. The desire to save costs during the hearing ought to be contrasted with the nature of the legal system within England and Wales, and the requirement to present well-qualified expert opinion in support of either party's arguments. However, the process does not entirely abandon individual examination of experts instead it is intended to supplement such an examination.

It should be noted that the recommendation for concurrent evidence is only a small part of Lord Justice Jackson's report. The body of chapter 38 goes straight to the heart of the problems expressed by the practitioners he canvassed regarding the expense of expert reports. The report focuses rightly on the expense incurred in the preparation and reading of complex reports which stray into areas not relevant to the dispute being heard. It addresses the appropriate time for appointment of experts and the merits or otherwise of experts being appointed early in the process. In my field of Delay Analysis I have seen examples where the early preparation of a report has ensured the right action is taken against the right party and conversely I have prepared reports where the action had already commenced and my report was prepared to assist the party to quantify the periods of delay under the various heads of claim.

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In Lord Justice Jackson's analysis of the responses he had received from practitioner's he commented as follows:

"(d) Concurrent evidence

3.23 Proposal for a pilot. A number of experts, practitioners and judges have expressed support for the use of concurrent evidence (known colloquially as "hot tubbing") in appropriate cases. It is said to be particularly effective in valuation and similar disputes. I recommend that concurrent evidence be piloted, but only in cases where the parties, the experts, the lawyers and the judge all consent to this procedure.

3.24 Possible future rule change. The results of any pilot study must be evaluated with care, in order to ascertain (a) the types of case in which concurrent evidence is successful, (b) what costs are saved and (c) whether the parties and their advisers perceive the process as enabling each side's case to be properly considered. If the results of this assessment are positive, then consideration should be given to amending Part 35, so that it expressly enables the judge to direct that the concurrent evidence procedure be used in appropriate cases."

It is therefore not surprising that the recommendations of the report followed his analysis recommending that: "... 'concurrent evidence' should be piloted in cases where all parties consent. If the results of the pilot are positive, consideration should be given to amending CPR Part 35 ... in appropriate cases."

It gives back to experts their proper role of helping the court to resolve disputes. Also it does away with the 'one on one' gladiatorial combat, hence time is saved, because instead of counsel turning round to take whispered instructions during cross-examination, he/she puts questions to the experts in the 'hot tub'. Both/all experts can then deal with the particular point. The procedure does not enable experts to "get away with" flawed evidence between cross-examining counsel and each expert.

At the hearing the process appeared to be proceeding very smoothly with each expert in turn answering the questions of the respective counsel. The approach brought instantly to light the differing opinions on issues at the centre of the dispute. Counsel was able to illustrate the contrasting opinions and allowed for the examination of the different individual expert's views. My colleague Paul Kelly gave evidence in the Kingdom of Lesotho in a hot tub of four experts of different disciplines, one of whom was the Tribunal's expert. In this case the procedure was adopted due to the Tribunal running out of time at the hearing and in this respect Paul confirms it was very effective.

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