Published on 24 May 2022

EXPERT EVIDENCE IN CIVIL PROCEEDINGS AFTER THE NEW RULES OF COURT 2021

[2022] SAL Prac 12

SOH Kian Peng[1]
Adjunct Faculty, Yong Pung How School of Law, Singapore Management University.

Adel **ZAID HAMZAH**
Research Assistant, Yong Pung How School of Law, Singapore Management University.

I. Introduction

1 The new Rules of Court 2021 ("ROC 2021") which came into effect on 1 April 2022 are the result of reforms aimed at modernising the civil justice system and enhancing the efficiency of resolving disputes while keeping legal costs reasonable. One key change, which will be of interest to practitioners, is how expert witnesses are dealt with under the ROC 2021. This article provides a summary of the changes regarding expert evidence, considers the impact of these changes moving forward, and proposes some solutions to potential issues raised by these changes.

II. Key changes to expert evidence: a court-regulated expert evidence process

2 Before the ROC 2021, expert evidence was governed under O 40A of the previous Rules of Court[2] which provided that:

---

1 The article is written in the author's personal capacity, and the opinions expressed in the article are entirely the author's own views.

The authors would like to thank Prof Chen Siyuan for his comments and suggestions on an earlier draft.

2 Rules of Court (Cap 322, R 5, 2014 Rev Ed).

(a) The court could limit the number of expert witnesses called to trial.[3]

(b) Experts owed a duty to assist the court on matters within their expertise.[4]

(c) Expert evidence needed to adhere to certain requirements.[5]

(d) A party could, with the court's leave, put written questions to another party's expert to clarify his report.[6]

(e) The court could direct a discussion between experts for them to identify the issues in the proceedings and, where possible, reach an agreement on an issue.[7]

(f) The court could order that some or all of the expert witnesses testify as a panel.[8]

3 Under the ROC 2021, expert evidence is now governed under O 12. A brief glance at O 12 reveals many changes from the old O 40A. For one, an expert is defined as a person with scientific, technical or other specialised knowledge based on training, study or experience,[9] which largely comports with definition found under the Evidence Act 1893[10] ("Evidence Act"). But more importantly, four fundamental changes ought to be noted. First, expert evidence may not be used without leave of court.[11] Second, as far as possible, parties *must* agree on one common expert.[12] Third, the court will consider whether the expert evidence will contribute materially to the determination of any issue in the case.[13] Fourth, the issue of costs in the event that a joint expert is appointed.

3 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 1.
4 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 2.
5 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 3.
6 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 4.
7 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 5.
8 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 40 r 6.
9 Rules of Court 2021, O 12 r 1(1). Under the old regime, an expert was never defined.
10 2020 Rev Ed.
11 Rules of Court 2021, O 12 r 2(2).
12 Rules of Court 2021, O 12 r 3(1).
13 Rules of Court 2021, O 12 rr 2(2)–2(3).

4 The preceding changes were incorporated to address some difficulties associated with the old regime: expert witnesses often had irreconcilable differences in opinion which complicated issues before the court; party-appointed experts were presented with facts framed according to the perspective of the party hiring them; and the disproportionately high costs incurred in the preparation of expert testimony.[14] Since a key motivation of the ROC 2021 was to enhance judicial control over the litigation process and the efficiency of adjudication, these changes do not come as much of a surprise.[15]

5 With this in mind, this article turns now to examine some of the potential difficulties and uncertainties that may arise in the foreseeable future, and suggest how they may be resolved.

A. Expert evidence must be approved by the court

6 The biggest departure from the old Rules comes in the form of O 12 r 2(1) which states: "No expert evidence may be used in Court unless the Court approves." Guidance, as to when the court will approve the use of expert evidence, is provided by O 12 rr 2(2)–2(4). First, O 12 r 2(2) exhorts parties to consider whether expert evidence is needed in the first place. Second, O 12 r 2(3) states that the court must not approve the use of expert evidence unless it "will contribute materially to the determination of any issue in the case and the issue cannot be resolved" by an agreed statement of facts or by submission on mutually agreed materials. However, it bears noting that notwithstanding the mandatory language used in O 12 r 2(3), the court can still approve the use of expert evidence in such circumstances if it would be in the interests of justice to do so.[16] Finally, under O 12 r 2(4), the court can disallow or reject the use of expert evidence if it finds that

14 Public Consultation on Civil Justice Reforms, "Recommendations of the Civil Justice Review Committee and Civil Justice Commission" (26 October 2018) at p 19. See also David Llewelyn, "The Use of Experts in Legal Proceedings in Singapore Involving Intellectual Property Rights" (2013) 25 SAcLJ 480.

15 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at para 1 (Chairman: Justice Tay Yong Kwang).

16 Rules of Court 2021, O 3 r 2(1).

the expert lacks the requisite specialised knowledge in the issues referred to him or her, or if the expert lacks impartiality.

7 In essence, what this means is that for the court to approve the use of expert evidence, such evidence must go towards resolving any issue in the case, and the expert called must not only fall within the definition of an expert, but also have the requisite specialised knowledge to assist in the resolution of such issues. Clearly, parties must be more careful in precisely identifying the issues in dispute that would benefit from having expert witness testimony.[17] Common issues in dispute that could benefit from expert witness testimony include areas such as breach of the standard of care in negligence,[18] or valuation when it comes to the quantification of damages.[19] Further, while the courts have, in the past, adopted a lax approach in respect of who qualifies as an expert,[20] the additional requirement that the expert must have the requisite specialised knowledge in relation to the issues in dispute means that parties must also be more circumspect in choosing their expert witnesses.[21] After all, the witness may for all intents and purposes fall within the definition of an expert, but still lack the requisite specialised knowledge to testify.

8 That much is clear from cases such as *Casey Castello v Stefan Gonschior*[22] ("*Casey Castello*"). In that case, Lambert J, in preferring the evidence given by the defendant's expert witness,

17 See Supreme Court Practice Directions 2021 at para 56(6). The List of Issues ("LOI") is a neutral case management tool that identifies the principal issues in dispute as well as, among other things, the scope of factual and expert evidence (if any) that should be adduced. The court may direct that the LOI be filed at an appropriate stage of proceedings and that the LOI be included in the Pre-Case Conference Questionnaire.

18 See generally *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* [2020] 1 SLR 133.

19 See generally *Lua Bee Kiang v Yeo Chee Siong* [2019] 1 SLR 145.

20 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) at para 6.046.

21 Prior to the Registrar's Case Conference, parties would have to fill in the Expert Witness Template in Form 7 of Appendix B of the Supreme Court Practice Directions 2021 – amongst the information to be provided in the template, parties must state the list of issues to be referred to the proposed expert: see the Supreme Court Practice Directions 2021 at paras 56(8)–56(9). This is an opportunity for parties to consider if the expert they intend to call does have the requisite knowledge to deal with the list of issues.

22 [2021] EWHC 2742.

placed particular emphasis on the credentials and professional experience of the parties' expert witnesses. The factual issue that had to be decided was the manner in which the nasal septum could have been distorted. As Lambert J put it, the defendant's expert witness had spent her professional life examining the internal structure of the nose, compared to the plaintiff's expert witness who, despite having had considerable experience in cosmetic surgery, had nothing in his professional background suggesting expertise in the internal anatomy of the nose.[23]

9 Similar comments were also made in *Sakthivel Punithavathi v Public Prosecutor*[24] ("*Sakthivel*"). There, the issue was whether the cuts on the victim's hand were self-inflicted, or caused by the accused. V K Rajah J (as he then was), in preferring the evidence of the Defence's expert witness, appeared to give weight to the fact that the Defence's expert witness was vastly more experienced than the two expert witnesses called by the Prosecution.[25] In both *Casey Castello* and *Sakthivel*, the expert witnesses called to testify would, arguably, fall within the definition of an expert. It was, however, clear to the judges in both cases that while they were experts, they did not have the requisite specialised expertise to assist the court on the issues in dispute, and this correspondingly affected the weight that could be ascribed to their testimony.

10 The rationale then, for this additional requirement that the expert must also have the requisite specialised knowledge, is clear. If it is already evident at the pre-trial stage that an expert witness's specialised knowledge has nothing to do with the issues in dispute, such that the court would be unable to give that expert witness's testimony much weight (if at all), then time can be saved by simply not allowing parties to call such an expert. It is in this manner that O 12 r 2(4) saves time and costs by ensuring that only the best evidence that would assist in determining disputed issues is placed before the court.

23 *Casey Castello v Stefan Gonschior* [2021] EWHC 2742 at [63].
24 [2007] SGHC 54.
25 *Sakthivel Punithavathi v Public Prosecutor* [2007] SGHC 54 at [98].

11 The next question one might ask is whether O 12 rr 2(2)–2(4) are exhaustive. In other words, are the factors laid out in O 12 rr 2(2)–2(4) the only factors the court can take into account in deciding whether approval should be given? Further, once the provisions under O 12 rr 2(2)–2(4) are satisfied, does this automatically mean that the court would approve of the expert evidence? Here, the authors would say that regard must be had to O 3 r 1 which states that the Rules must be given a purposive interpretation, the Ideals set out in O 3 r 1(2), and O 3 r 2 which states that the court can order otherwise in the interests of justice even if the requirements in the Rules are expressed using imperative words. Given this, the authors are of the view that O 12 rr 2(2)–2(4) are non-exhaustive, and that it is not necessarily the case that once the requirements are fulfilled, the court will necessarily grant leave to use expert evidence.

12 One apparent problem arising from the proposition that the court can decline leave to use expert evidence with reference to other principles or notions (*ie*, apart from that set out in O 12 rr 2(2)–2(4)) is that such an "all-encompassing" discretion to reject expert evidence already exists within the Evidence Act.[26] Under s 47(4) of the Evidence Act, the courts already retain a discretion to exclude expert opinion evidence where it would be in the interests of justice to do so.[27] At first blush, it would appear that O 12 r 2(2) either duplicates or greatly overlaps with s 47(4) of the Evidence Act.

13 The authors, however, submit that there is no overlap or duplication between O 12 r 2(2) and s 47(4) of the Evidence Act.[28] While one may draw the finer conceptual point that the Rules of Court deal with procedure, and that admissibility is subject to compliance with procedural rules,[29] practically speaking, O 12

26 Evidence Act 1893 (2020 Rev Ed) s 47(4).
27 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) at paras 6.078–6.080.
28 Jeffrey Pinsler SC, "Expert Evidence and Adversarial Compromise: A Re-Consideration of the Expert's Role and Proposals for Reform" (2015) SAcLJ 55 at para 21.
29 Jeffrey Pinsler SC, "Expert Evidence and Adversarial Compromise: A Re-Consideration of the Expert's Role and Proposals for Reform" (2015) SAcLJ 55 at para 21.

r 2(2) would operate at the pre-trial stage to determine whether the expert evidence in question should even be placed before the court. If leave to use expert evidence is granted, s 47(4) of the Evidence Act would allow parties to object to the admissibility of such evidence during the course of trial (assuming, of course, that there are grounds to do so), and for the court to refuse to admit the evidence if it is indeed in the interests of justice to do so. That being said, it may well be the case that such situations may be rare given that the court would already have had to make its assessment in deciding whether to grant leave.

B. Parties must agree on one common expert

14 Another key change is that parties must, as far as possible, agree on one common expert.[30] Further, the court may itself appoint a court expert in place of or in addition to the parties' common expert or all the experts.[31] The suggestion, however, that the parties apply to court to appoint an impartial and objective expert is not a new one.[32]

15 One difficulty relates to what should be done where there is disagreement between the parties over the joint expert. For example, in the United Kingdom, r 35.7 of the Civil Procedure Rules 1998 ("CPR") similarly allows the court to direct that the evidence on an issue be given by a single joint expert. If the parties cannot agree on who should be the single joint expert, the English courts may either: (a) select the expert from a list prepared or identified by the parties; or (b) direct that the expert be selected in such other manner as the court may direct.[33]

16 It is submitted that the two abovementioned approaches can be considered in the future when parties have difficulties in agreeing on a joint expert. Naturally, while the ideal solution would be for parties to come to a common landing on the joint

30 Rules of Court 2021, O 12 r 3(1).
31 Rules of Court 2021, O 12 r 3(3).
32 See *Muhlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 where Chao Hick Tin JA noted that "it may well be wise and prudent" for parties to apply to the court to appoint an impartial and objective expert.
33 Civil Procedure Rules 1998 (UK) r 35.7(2).

expert, the realities of litigation are different. If there is no agreement between parties, the court could identify the reasons for the disagreement over the choice of expert and provide guidance, perhaps in the form of certain objective criteria to parties, so as to enable them to find common ground. In the event that all else fails, and parties are still diametrically opposed, it may well be necessary to allow them to call an expert witness of their choosing. After all, O 12 r 3 does not purport to set a cast-iron rule that only an agreed upon common expert is to be used, especially when read together with O 3 r 2(1). The reason is simple: justice must not only be done, but also be seen to be done.[34] Parties should not come away with the impression that they have been deprived of the opportunity to present their case because they have been made to rely on an expert witness that they have not agreed to call.

C. Expert evidence must contribute materially to the determination of the case

17 Another change this article examines is the requirement under O 12 r 2(2) that the expert evidence must "contribute materially" to the determination of any issue in the case.[35] The use of the phrase "contribute materially" in O 12 rr 2(2) and 2(3) suggests a much higher threshold than that prescribed under s 47(1) of the Evidence Act which states that the court must be "likely to derive assistance" from an opinion upon a scientific, technical or other specialised knowledge.[36] However, as has been pointed out earlier, O 12 rr 2(2) and 2(3) operate at the pre-trial stage to determine if expert evidence may be placed before the court whereas s 47(1) governs the admissibility of such expert evidence. That said, if it is accepted that the phrase "contributes materially" prescribes a higher threshold than that under s 47(1), the court will, in all likelihood, derive assistance from the expert evidence.

34 *The King v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259.
35 Rules of Court 2021, O 12 rr 2(2)–2(3).
36 Evidence Act 1893 (2020 Rev Ed) s 47(1).

18 Having said all this, when would expert evidence contribute materially to the determination of an issue? It would be useful to refer, once again, to r 35.1 of the CPR, which similarly states that "expert evidence shall be restricted to that which is reasonably required to resolve the proceedings". In *British Airways Plc v Spencer*,[37] the issue of when expert evidence would be "reasonably required to resolve the proceedings" was considered. The High Court held that the following questions may serve as a useful guide:[38]

> (a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.
>
> (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it…
>
> (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings…
>
> [emphasis in original]

19 On requirement (c), the High Court noted that the following factors should be taken into account: (a) the value of the claim; (b) the effect of a judgment either way on the parties; (c) who is to pay for the commissioning of the evidence on each side; and (d) the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).[39]

20 Although r 35.1 of the CPR is couched in less exacting terms than O 12 rr 2(2) and 2(3), the authors submit that the aforementioned factors would also be relevant in the court's assessment of whether the evidence contributes materially to

37 [2015] EWHC 2477 (Ch).
38 *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at [68].
39 *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at [63].

the determination of any issue in the case. The consideration of these factors, however, should perhaps be more stringently applied to reflect the very purpose of O 12 r 2, which is to enhance efficiency and speed of adjudication.[40]

D. Costs

21 The final issue to address would be the apportionment of costs in the event that parties are able to agree on a joint expert. Once more, reference may be made to r 35.8(5) of the CPR which states: "Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses."[41]

22 In the authors' view, apportioning costs equally between parties is a sensible starting point, especially since proportionality is a fundamental principle where costs are concerned.[42] After all, both parties benefit equally from having a joint expert, in terms of time saved during the trial. Further, having an equal apportionment of costs as the default starting position would also be consistent with one of the Ideals of the ROC 2021, *viz*, enabling fair access to justice. Having a joint expert and equally apportioning costs serve to level the playing field for parties which lack the financial resources, who would otherwise end up having to bear the disproportionate costs of a successful party in engaging his experts.[43] While apportioning costs equally should be the default position, a party may be made to bear the costs of

40 "Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee" (11 June 2021) at para 85.

41 See also r 31.53 of the Uniform Civil Procedure Rules 2005 (New South Wales, Australia) which provides that where the remuneration of a court-appointed expert cannot be agreed upon by parties, it will be fixed in accordance with the directions of the court, and the parties will be jointly and severally liable for the court-appointed witness's remuneration unless the court directs otherwise.

42 Rules of Court 2021, O 21 r 2(2)(*g*).

43 Jeffrey Pinsler SC, "Expert Evidence and Adversarial Compromise: A Re-Consideration of the Expert's Role and Proposals for Reform" (2015) SAcLJ 55 at para 25.

a joint expert if, for example, they have chosen to cross-examine the expert when there is no need to do so.[44]

III. Conclusion

23 There is no doubt that the ROC 2021 will likely enhance the efficiency and expediency of the adjudication process where expert evidence is concerned. These fresh changes, however, may raise some interesting and novel questions as the profession adapts and adjusts to the new Rules. This article has sought to examine some of these questions, and highlighted certain authorities that may be of use to practitioners moving forward.[45]

44 See Rules of Court 2021, O 12 r 6(5), which states that "[t]he parties must consider whether the experts need to be cross-examined in Court".

45 Authorities from the UK dealing with the Civil Procedure Rules 1998 and New South Wales, Australia, dealing with the Uniform Civil Procedure Rules 2005 are likely to be of use given that both jurisdictions have introduced the concept of a "joint expert" as well. See Jeffrey Pinsler SC, "Expert Evidence and Adversarial Compromise: A Re-Consideration of the Expert's Role and Proposals for Reform" (2015) SAcLJ 55 at para 26.