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WHEN TO CALL YOUR EXPERT IN CIVIL LITIGATION

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SOH Kian Peng[1]
Justices' Law Clerk, Supreme Court of Singapore;
Adjunct Faculty, Yong Pung How School of Law,
Singapore Management University.

I. Introduction

1 In an earlier piece[2] concerning expert evidence in civil proceedings after the introduction of the Rules of Court 2021 ("ROC 2021"), it was highlighted that the questions set out by the UK High Court in *British Airways Plc v Spencer*[3] ("*British Airways*") was a useful guide in the court's assessment of whether the expert evidence would contribute materially to the determination of any issue in the case (as required under O 12 r 2(2)). According to the *British Airway* guidelines, expert evidence would be admitted if it was necessary to resolve an issue in dispute. However, if the expert evidence would assist the court, but was not necessary to resolving the issue, then the court had to consider, *inter alia*, factors such as the value of the claim and the delay which might be occasioned by the production of such material.

2 While the ROC 2021 was designed to adopt an approach tailored for local litigation to obviate the need to look into the genealogy of a rule that had been adopted from other jurisdictions,[4]

1 The article is written in the author's personal capacity. The opinions expressed in the article are entirely the author's own views and do not reflect the views or positions of the entities the author belongs to. I am grateful to Mr Jayakumar Suryanarayanan for his comments on an earlier draft. All errors, however, are mine alone.

2 Soh Kian Peng & Adel Zaid Hamzah, "Expert Evidence in Civil Proceedings After the New Rules of Court 2021" [2022] SAL Prac 12 at paras 19–20.

3 [2015] EWHC 2477 (Ch).

4 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) at para 3.

in this author's view, some value can still be gleaned from English cases. For one, the wording of O 12 of the ROC 2021 is *in pari materia* with the equivalent provision of the UK Civil Procedure Rules ("CPR").[5] English cases are therefore likely to be useful in illustrating how the rules under O 12 may potentially be applied. This article therefore seeks to examine cases where the UK courts have set out their reasons in relation to allowing or disallowing expert evidence. This may help litigators consider whether it will be gainful to even consider making the application to adduce expert evidence in the first place – and if an application is to be made – what are some general points that should be borne in mind.

3 Apart from this, two other issues relating to the use of expert evidence also warrant consideration. The first is who bears the burden of establishing that the expert evidence will "contribute materially" to the determination of any issue in the case. The second is the approach the court should take in cases where parties have agreed to instruct a joint expert, but one party subsequently becomes dissatisfied with that joint expert. I turn now to canvass these two issues before turning to examine the cases.

II. The two issues

4 In relation to the first issue, English cases such as *JP Morgan Chase v Springwell*[6] ("*JP Morgan*") and *In re RBS Rights Issue Litigation*[7] tell us that "[t]he burden of establishing that expert evidence is both (i) admissible and (ii) reasonably required (i.e. not just potentially useful) is on the party which seeks permission to adduce the evidence concerned".[8] It is submitted that the English position can be usefully adapted in so far as the operation of O 12 of the ROC 2021 is concerned. Here, the relevant provisions are O 12 rr 2(2) and 2(3) which stipulate that: (a) parties must

5 Civil Procedure Rules 1998 (UK) r 35.
6 [2007] 1 All ER (Comm) 549.
7 [2015] EWHC 3433(Ch). See *Clarke v Marlborough Fine Art (London) Ltd* [2002] EWHC 11 (Ch) at [5].
8 *In re RBS Rights Issue Litigation* [2015] EWHC 3433 at [18]; see also *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm) at [19].

consider whether "expert evidence will contribute materially to the determination of any issue that relates to scientific, technical or other specialised knowledge"; and (b) 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 submissions based on mutually agreed materials.

5 The effect of these provisions is that whether expert evidence is allowed in litigation is very much a court-controlled process. The court must be convinced that expert evidence is required. This is relatively straightforward where parties disagree that expert evidence is required – the burden would lie on the party seeking to call the expert to put forth reasons as to why the expert evidence would contribute materially to resolving the issues in dispute. However, in a case where parties are agreed that expert evidence is required, and would like to summon a joint expert, then they should jointly bear the burden of convincing the court that expert evidence should be allowed.[9] The mere fact that parties are agreed that expert evidence is required does not automatically mean that leave to adduce expert evidence would be granted;[10] cogent reasons would have to be advanced to convince the court that the expert evidence would "contribute materially" to the determination of issues in dispute.

6 As for the second issue – the UK Court of Appeal decision in *Daniels v Walker*[11] ("*Walker*") usefully illustrates a situation where parties had initially agreed to instruct a joint expert, but one party – having read the joint expert report – became dissatisfied with the joint expert. There, the defendant applied for leave to obtain and rely on the evidence of his own expert. The application for leave was dismissed, and the defendant appealed.

9 This is done at the case conference so that directions for expert evidence can be dealt with in a single application pending trial: see *Singapore Rules of Court – A Practice Guide* (Chua Lee Ming editor-in-chief; Paul Quan gen ed) (Academy Publishing, 2023 Ed, 2023) at para 12.014.

10 Rules of Court 2021, O 12 rr 2(1)-2(3).

11 [2000] 1 WLR 1382.

7 Lord Woolf allowed the appeal, noting that where a party had sensibly agreed to a joint report and that joint report was subsequently obtained as a result of joint instructions:[12]

> … the fact that a party has agreed to adopt that course does not prevent that party [from] being allowed facilities to obtain a report from another expert or, if appropriate, to rely on the evidence of another expert.

8 In particular, Lord Woolf noted that if a party, for reasons which are "not fanciful", wishes to obtain further information before making a decision as to whether there is a particular part (or indeed the whole) of the joint expert's report which he or she may wish to challenge, then they should, subject to the court's discretion, be permitted to obtain that evidence.

9 In that vein, *per* Lord Woolf, the sensible approach was not to "ask the court straight away to allow the dissatisfied party to call a second expert".[13] In cases where a modest amount was involved, it would be disproportionate to obtain a second report in any circumstances – the most that should be allowed is merely to put a question to the expert who had already prepared a report.[14] As for cases involving a substantial sum, Lord Woolf's view was that a joint expert report should still be called wherever possible, and in cases of subsequent disagreement, there would then be an issue as to whether questions should be put to the expert or whether each party should get their own expert.[15] Lord Woolf thus appeared to take the view that even if additional experts were to be called, the fact that a joint expert had already been instructed meant that the issues were already narrowed, and so involving additional experts would not lead to a greater expenditure in either costs or time as one might think.

10 In our local context, the ROC 2021 does provide for such situations. For one, parties who are dissatisfied with aspects of the joint expert report, can seek the leave of the court and request "in writing that an expert clarify his or her report in any

12 [2000] 1 WLR 1382 at 1387.
13 [2000] 1 WLR 1382 at 1387.
14 *Daniels v Walker* [2000] 1 WLR 1382 at 1387.
15 *Daniels v Walker* [2000] 1 WLR 1382 at 1387.

aspect".[16] One other solution is for the court to appoint a court expert in addition to or in place of the parties' common expert or all the experts – this is provided by O 12 r 3(3) which states that the Court can do so in a "special case".[17] There is, after all, no:[18]

> … reason why the court should not appoint a court expert in the course of a hearing if it emerges that the common expert or party experts are not providing the court with the expected level of assistance, or where partiality is clearly apparent.

11 Finally, it is worth noting that there is nothing expressly barring the Court from allowing further experts from being called – after all, under the ROC 2021, the Court proactively controls its own proceedings and this includes deciding whether expert testimony should be allowed. In this vein, Lord Woolf's approach is a pragmatic one. If one party expresses dissatisfaction with a joint expert after the joint expert report has been prepared, the Court could consider allowing that party to obtain and produce a second report from another expert.

III. Observations as to the circumstances in which expert evidence would be allowed

12 I turn now to peruse English cases which have discussed whether expert evidence should be allowed in the context of civil trials – starting first with the decision of Aikens J (as he then was) in *JP Morgan*.[19]

13 In that case, the claimants ("Chase") had sought declarations of non-liability to the defendant ("Springwell") whereas Springwell counterclaimed for damages well in excess of US$500m. Springwell's main case against Chase was that Chase had given negligent investment advice and made fraudulent implied representations which led Springwell to purchase certain debt instruments. Four expert reports were adduced by

16 Rules of Court 2021, O 12 r 6(3).
17 *Singapore Rules of Court – A Practice Guide* (Chua Lee Ming editor-in-chief; Paul Quan gen ed) (Academy Publishing, 2023 Ed, 2023) at para 12.035.
18 *Singapore Rules of Court – A Practice Guide* (Chua Lee Ming editor-in-chief; Paul Quan gen ed) (Academy Publishing, 2023 Ed, 2023) at para 12.035.
19 *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm).

Springwell, and Chase sought an order that three of the expert reports and one section of the fourth expert report be excluded from evidence at trial on the ground that the evidence concerned was inadmissible, inappropriate and/or was not reasonably required to resolve the proceedings.[20]

14 Aiken J's ruling, in relation to the first report – produced by one Ms Morse, a lawyer – is particularly instructive. Ms Morse's report was disallowed as it was directed at the proper construction and scope of certain contractual terms.[21] The construction of contracts was a question of law for the court to decide,[22] and while expert evidence could be adduced to clarify technical expressions which parties have used in the contract,[23] neither party in this case had pleaded any particular technical meaning for the words used. In Aiken J's view, Ms Morse's report was of little material assistance to a judge who had to ultimately decide, as a matter of law, the proper construction of the contractual terms and its scope.

15 Two points may be drawn from this. First, where contractual interpretation is concerned, expert evidence can, at the very least, be used to clarify technical terms used in the contract.[24] Second, and perhaps more importantly, parties must have pleaded that the words used in the contract have a technical meaning. One way this may be shown is by reference to the

20 *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm) at [11].

21 Specifically, these were terms set out in two letters which Chase had sent to Springwell: *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm) at [27].

22 See *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [208]–[209].

23 *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm) at [30].

24 See, *eg*, *Verona Capital Pty Ltd v Ramba Energy West Jambi Ltd* [2016] SGHC 55 at [13] and [104] where the court sought clarification as to the effect of the disclaimer contained within a set of slides – an expert witness testified as to the interpretation which would be given within the industry of the contents of the slides (though it should be noted that the plaintiff's appeal was allowed by the Court of Appeal with no written grounds of decision rendered); and *Sigma Builders Pte Ltd v Chong Chen Building Materials & Construction Pte Ltd* [2012] SGDC 112 at [27]–[31].

extrinsic facts which parties have pleaded.[25] After all, in seeking to rely on extrinsic facts to advance their interpretation of the contract, parties would have an obligation to disclose documents relevant to the facts they have pleaded[26] – such documents may be technical documents in which an expert's testimony would be useful.

16 A decision which further illustrates the effect of one's pleaded case on whether expert evidence would be allowed, is that of Master Clark in *Davies v Ford*.[27] That case concerned an application by the second defendant to adduce expert evidence at the trial for the assessment of damages. Expert evidence was sought on the period for which the company ("GBR") would have continued to trade and the profits it would have made. Master Clark denied the application on the ground that the expert's technical expertise was not relevant to the issues. Crucially, Master Clark noted that the proposed issues were not technical issues and that the defendant's pleaded case did not require the quantification of the profits GBR would have made. One other important factor was the cost of the evidence. Master Clark noted that allowing the evidence would increase parties' costs by about £100,000, which was, notwithstanding the amount claimed (in excess of £1m), a substantial amount, especially considering that the evidence would at best relate to a marginal part of the defendant's case.

17 Leaving aside the point on pleadings, in applying to adduce expert evidence, it is also important to convince the court that the evidence may be properly characterised as expert evidence as opposed to evidence of fact – this point was made by Chief Master Marsh in *Glaxo Wellcome UK Ltd v Sandoz Ltd*[28] ("*Glaxo*"). The claimants had sued the defendants for trademark infringement and passing off in relation to the inhaler, Seretide. The defendants made an application for parties to adduce expert evidence on the following issues:

25 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [73]; *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [46]–[49].
26 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [73(d)].
27 [2020] EWHC 3063 (Ch).
28 [2017] EWHC 1524 (Ch).

(a) the medical conditions treatable by the use of inhalers, including the types of inhalers and their active ingredients ("Issue 1");

(b) the practice of healthcare professionals, including general practitioners, in relation to prescribing inhalers ("Issue 2"); and

(c) the practice of healthcare professionals, including general practitioners, in relation to dispensing prescriptions relating to inhalers ("Issue 3").

18 In relation to Issue 1, Chief Master Marsh noted that such evidence could not be characterised as expert evidence as it was "not a matter of opinion" nor was it "didactic evidence that neither need be contentious" or require an expert's explanation. In any case, parties did not find the information contained in Issue 1 to be contentious.

19 As for the remaining issues, Chief Master Marsh ruled that they could not properly be characterised as expert evidence – the application had not been supported with evidence about the identity of the likely individuals who would be introduced as experts, their own experience and the sort of evidence which they might give. In particular, and this might be of interest to intellectual property litigators, Chief Master Marsh noted that it was:[29]

> … one thing for a witness to give evidence about his or her experience in a particular area from which the Court itself is able to extrapolate and quite another for a witness to give evidence which is founded in a body of expertise rather than the witness' own experience.

20 It is therefore important to be clear as to whether the evidence one seeks to adduce is properly characterised as expert evidence (for which the court's leave is required) or factual evidence. Sufficient information should also be put before the court so as to demonstrate that the evidence is indeed properly characterised as expert evidence.

29 See *Fenty v Arcadia Group Bands Ltd* [2013] EWHC 1945 (Ch).

21 The final case which I turn to is *Liverpool Insurance Co Ltd v Khan*[30] ("*Liverpool Insurance*"). In that case, the insurer had brought committal proceedings against the respondents which included solicitors and a doctor (one Dr Zafar). The insurer alleged that the instructed solicitor as well as the doctor who gave expert evidence had deliberately altered the evidence presented to court for the purposes of establishing the claim. The issue before Her Honour Judge Walden-Smith was whether it was appropriate to grant permission for expert evidence to be called on behalf of the insurance company – in her view, it was not. The issue in contempt proceedings was not what a doctor would do or ought to do (as would be the case in a professional negligence suit),[31] but rather the "manner in which he should report to the court and his duties to the court".[32] The court would, in contempt proceedings, scrutinise how "Dr Zafar should have behaved in providing his report to the court and whether he was misleading the court" and this was a matter for the court to determine, in which expert opinion was not necessary. HHJ Walden-Smith also took the view that dismissing the insurer's application to adduce expert evidence would not create an uneven playing field. Dr Zafar would not have an advantage over the insurers by dint of his medical knowledge as he could be cross-examined and submissions could be made as to the proper inferences and conclusions to be drawn from the answers given. *Liverpool Insurance* thus illustrates that being clear on the issues that the court has to decide in the case before it will, by and large, give parties an indication as to whether an application for expert evidence has to be made (or not).

IV. Conclusion

22 In summary, when deciding whether to apply to adduce expert evidence, it is important to take a look at one's pleadings which form the very foundation of one's case. If no link can be drawn between the expert evidence sought to be produced and

30 [2017] EWHC 1314 (QB).
31 See *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 and *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771.
32 *Liverpool Insurance Co Ltd v Khan* [2017] EWHC 1314 (QB) at [22].

a pleaded point, then it is unlikely that the expert evidence will be allowed. Costs are also another important consideration. If summoning an expert would substantially increase costs, then searching questions must be asked as to whether such evidence is even necessary in the first place.[33] Finally, one should also consider whether the evidence in question is properly characterised as factual evidence (which may be adduced without leave), or expert evidence (for which leave under O 12 is required).

33 See Soh Kian Peng, "Tort Defences and Negligent Medical Advice" (2023) 39(1) Journal of Professional Negligence 44 at 48.