(2022) 34 SAcLJ 75
(Published on e-First 26 March 2021)

THE EXPERT AND THE HEARSAY RULE

Recent Developments and Proposals for Updating the Evidence Act

The case law raises controversy about the application of the hearsay rule to factual information relied upon by the expert witness in reaching his opinion. In a recent case, three judges of the Singapore International Commercial Court disagreed on this very issue.[1] The purpose of this article is to examine the rules of evidence in this area (including the positions taken in various cases decided at home and abroad) and to explain their operation. Proposals for the reform of the Evidence Act (Cap 97, 1997 Rev Ed) will be made in the interest of clarifying the law.

Jeffrey **PINSLER** SC
LLB (Liverpool), LLM (Cambridge), LLD (Liverpool);
Barrister (Middle Temple); Advocate and Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 This article concerns the intersection between expert opinion and hearsay evidence. It is a long-established rule – the rule against hearsay – that the facts which form the basis of an expert's opinion must be admissible.[2] These facts may be within the expert's personal knowledge (in which case he can testify about them), or be proved by another witness who has personal knowledge of those facts, or by admissible documents and/or real evidence.[3] Evidential challenges may arise when the expert relies on facts referred to in documents or another person's or entity's oral information if the documents are not properly proven or the other person does not testify in court. The hearsay rule applies to the expert as it does to any witness. However, the common law makes a distinction between information and knowledge which the expert has acquired from various sources during his professional career ("professionally acquired information") and facts in issue of which the

1 This case is discussed from para 9 onwards.
2 The hearsay rule also extends to out-of-court statements of opinion that are relied on by the expert. See paras 17, 19 and 23 below.
3 As when an item or object or a substance reveals the relevant facts.

expert has no personal knowledge ("primary facts"). While primary facts must be proved, professionally acquired information does not (although relevant information must be included in the expert's report).[4] Professionally acquired information would ordinarily include the expert's own professional experience, the knowledge and learning he has acquired from his research and training throughout his career including information gained from books, articles, papers, reports and other materials (whether published or not)[5] concerning his area of expertise, and input from his professional colleagues and others involved in the course of his work.

II. Examination of the case law

2 Although professionally acquired information is technically hearsay (because the expert's reliance on it expressly or impliedly asserts that it is truthful), the hearsay rule is relaxed in these circumstances "in the interest of logistical practicality", as Sundaresh Menon CJ put in *Anita Damu v Public Prosecutor*[6] ("*Anita Damu*"). It would be extremely burdensome (if not impossible) for a party to adduce direct evidence of the truth of all the information which that party's expert has accumulated in the course of his career. As Menon CJ put it: "[I]t would be impractical to require in every instance that those other professionals [whose information the expert relies upon] also give evidence of their work, even though this might technically constitute general hearsay evidence." The principle that the rule against hearsay does not apply to professionally acquired information relied on by an expert to provide an opinion was affirmed early on in *English Exporters Pty Ltd v Eldonwall*[7] ("*English Exporters*") in which Megarry J considered the position of an expert giving his opinion on rental value:[8]

> As an expert witness, the valuer is entitled to express his opinion about matters within his field of competence. In building up his opinions about values, he will no doubt have learned much from transactions in which he has himself been engaged, and of which he could give first-hand evidence. But he will also have

4 See O 40A r 3(1)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). In *R v Abadom* [1983] 1 WLR 126 at [131], the Court of Appeal stated that where the expert does rely on extrinsic information and knowledge, he should expressly indicate this in his evidence so that the court can properly assess the foundation of his opinion.

5 The Court of Appeal stated in *R v Abadom* [1983] 1 WLR 126 at [131] that experts do not need to "limit themselves to drawing on material which has been published in some form. Part of their experience and expertise may well lie in their knowledge of unpublished material and in their evaluation of it".

6 [2020] 3 SLR 825 at [31].

7 [1973] 1 Ch 415. For an early criminal case on point, see *R v Turner (Terence)* [1957] QB 834 at 840B.

8 *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415 at 420.

> learned much from many other sources, including much of which he could give no first-hand evidence. Textbooks, journals, reports of auctions and other dealings, and information obtained from his professional brethren and others, some related to particular transactions and some general and indefinite, will all have contributed their share … Nevertheless, the opinion … is none the worse because it is in part derived from the matters of which [the valuer] could give no direct evidence.

3 Megarry J did not consider this professional information to be hearsay evidence: "No question of giving hearsay evidence arises in such cases, the witness states his opinion from his general experience."[9] The learned judge contrasted these circumstances to the situation in which the expert gives evidence of facts in issue in the case of which he has no personal knowledge.[10] With respect, the learned judge's characterisation of professionally acquired information as not being hearsay is not correct. Professionally acquired information is hearsay to the extent that the expert relies on the information on the assumption that it is true. However, as such information does not concern the primary facts of the case, it does not attract the full rigour of the hearsay rule. Later English cases would regard the professionally acquired information as "general hearsay" which, despite the hearsay rule, is admissible. This was confirmed by Menon CJ in *Anita Damu*.[11]

4 In *R v Abadom*,[12] the English Court of Appeal endorsed the distinction made by Megarry J in *English Exporters* between professionally acquired information (which can be admitted despite the hearsay rule) and primary facts that have to be proved by admissible evidence. The appellant was charged with robbery. It was alleged that the appellant (and others) broke into a family office and that he shattered a window to cause fright. Subsequent to his arrest, shoes retrieved from his residence were found to have fragments of glass attached to and embedded in them. Identity was an issue in this case because the appellant was wearing a balaclava helmet during the robbery. One of the two expert witnesses ("E1") called by the prosecution testified that he had chemically analysed the fragments of glass connected to the shoes and the glass from the window. E1 found that they were similar. The second expert witness ("E2") compared several of the fragments of glass found in and on the shoes with each other and with the glass from the window and determined they all had identical refractive index. Having taken into account E1's chemical analysis and having consulted statistics

9 *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415 at 421.
10 *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415 at 421.
11 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [31]. See para 2 above.
12 [1983] 1 WLR 126.

of the refractive index of broken glass analysed in forensic laboratories,[13] E2 opined that the refractive index of the glass from the shoes and the window occurred in 4% of analysed glass. He concluded[14] that there was "very strong evidence that the glass from the shoes [was] the same as the glass from the window, in fact it originated from the window". On appeal, the appellant argued that E2 had based his opinion on hearsay (that is, the statistics were collated by persons not called as witnesses). The Court of Appeal held that E2 was entitled to ground his opinion on the statistics:[15]

> As an expert in this field [E2] was entitled to express an opinion on this question, subject to laying the foundation for his opinion and subject, of course, to his evidence being tested by cross-examination for evaluation by the jury. In the context of evidence given by experts it is no more than a statement of the obvious that, in reaching their conclusion, they must be entitled to draw upon material produced by others in the field in which their expertise lies.

5 The Court of Appeal summed up the principle as follows: "We are here concerned with the cogency or otherwise of an opinion expressed by an expert in giving expert evidence. In that regard it seems to us that the process of taking account of information stemming from the work of others in the same field is an essential ingredient of the nature of expert evidence."[16] The position would have been different if E2 had not based his determination of the refractive index of the glass on his own personal knowledge and E1's chemical analysis of it and, instead, relied on information given to him out of court. This is because E2 would then be purporting to prove primary facts about which he had no personal knowledge: "[I]t would no doubt have been inadmissible if [E2] had said in the present case that he had been told by somebody else that the refractive index of the fragments of glass and of the control sample was identical, and any opinion expressed by him on this basis would then have been based on hearsay."[17] The court went on to state that if E2 had not himself ascertained the refractive index, the person who had done so would have needed to testify prior to E2 giving his opinion.

6 Although *English Exporters* and *Abadom* were not referred to by Chan Seng Onn JC (as he then was) in *Gema Metal Ceilings (Far East) v Iwatani Techno Construction (M)*[18] ("*Gema Metal*"), the learned judge

13 The statistics from the forensic laboratories were collated by the Home Office Central Research Establishment.

14 Having been asked by the Prosecution whether, on the basis of his expert knowledge and the further analysis made by E1, which he had taken into account.

15 *R v Abadom* [1983] 1 WLR 126 at 129.

16 *R v Abadom* [1983] 1 WLR 126 at 131.

17 *R v Abadom* [1983] 1 WLR 126 at 131.

18 [2000] SGHC 37.

applied the common law principles for the first time in Singapore. The case concerned the design of a metal strip ceiling system which had been supplied by the plaintiff to the defendant. In response to the plaintiff's claim for the price of the strip ceiling system, the defendant claimed that it was not of merchantable quality and not fit for its purpose. The defendant's expert (a civil engineer) gave his opinion that the design was defective. He relied on his assessment of certain reports and the results of tests carried out by a firm in Hong Kong. The expert was not involved in any of the tests and was not in attendance when they were conducted. As the makers of the reports were not called to prove the primary facts and none of the exceptions to the hearsay rule applied,[19] the reports were inadmissible hearsay.[20] Chan JC acknowledged that professionally acquired information ("general hearsay" as opposed to "specific hearsay") would not be subject to the strict application of the hearsay rule:[21]

> I recognise that most experts frequently employ hearsay to some degree in forming their views. In fact, as a matter of convenience, courts have sometimes tended not to insist upon proof of the extrinsic materials customarily employed by experts to perform their work, namely understanding obtained from the use of professional libraries and knowledge acquired in the discharge of professional duties.

7 Furthermore, the learned judge excluded the parts of the expert opinion that relied on the reports: "Where an expert seeks to give an opinion the basis of which is dependent upon the truth of hearsay evidence, that expert's evidence is likewise inadmissible."[22] Consequently, "an expert is only permitted to give his opinion when the primary facts upon which that opinion is based are capable of being proved by admissible evidence".[23] *Gema Metal* may be illustratively contrasted to the judgment in *Abadom*.[24] It will be recalled that the English Court of Appeal ruled that the expert, having proved the primary facts through his own evidence, was entitled to refer to the Home Office statistics to properly express his opinion (those statistics constituted general hearsay which could be relied on). In *Gema Metal*, the expert based his opinion

19 The decision that the exceptions to the hearsay rule did not apply might be different today because of the amendments to s 32 of the Evidence Act (Cap 97, 1997 Rev Ed) in 2012, which broadened the scope of admission of hearsay. See para 27 below.

20 *Gema Metal Ceilings (Far East) v Iwatani Techno Construction (M)* [2000] SGHC 37 at [74].

21 *Gema Metal Ceilings (Far East) v Iwatani Techno Construction (M)* [2000] SGHC 37 at [74].

22 *Gema Metal Ceilings (Far East) v Iwatani Techno Construction (M)* [2000] SGHC 37 at [74].

23 *Gema Metal Ceilings (Far East) v Iwatani Techno Construction (M)* [2000] SGHC 37 at [74].

24 See paras 4 and 5 above.

on reports that contained the primary facts (the reports constituted specific hearsay which could not be relied on).

8 The distinction between "general hearsay" and "specific hearsay" (specific hearsay is also referred to as "the basis rule") was summarised by Menon CJ in *Anita Damu*[25] as follows:

> It is true that the basis rule has often been relaxed in the interests of logistical practicality, such as to enable experts to rely on evidence from authoritative publications or other extrinsic material customarily employed in their line of work … However, the relaxation of the basis rule most commonly occurs in cases where the expert's opinion is based on 'general hearsay', such as prior research, as opposed to 'specific hearsay' pertaining to a particular inquiry, fact, examination or experiment … This, to me, is a principled distinction. Where an expert gives evidence that relies in part on the work of other members of the profession which are generally accepted as authoritative and uncontroversial, it would be impractical to require in every instance that those other professionals also give evidence of their work, even though this might technically constitute general hearsay evidence. The relaxation of the basis rule in such circumstances would simply be in the interests of practicality and would not cast any doubt on the soundness of the expert's evidence. On the other hand, where an expert puts forth an opinion that is founded on the specific hearsay evidence of another individual and the truthfulness of that other individual's assertion is not only hotly contested, but, as in this case, is the very issue in dispute, the basis rule ought to apply with full rigour. …

9 The principles expressed in *Anita Damu* and *English Exporters* were applied in *Kiri Industries Ltd v Senda International Capital Ltd*[26] ("*Kiri Industries*"), which involved the valuation of a company ("Dystar") and Kiri Industries' shares in Dystar. The expert concerned relied on market and broker reports and forecasts ("the reports and forecasts") of selected comparable companies to justify her opinion. These reports and forecasts were based on published information about those companies. The opposing party objected to the admissibility of the reports and forecasts on the ground that they were hearsay evidence (the makers of these documents were not called as witnesses).

10 Although the judges in *Kiri Industries* agreed that the reports and forecasts relied upon by the expert were admissible, their reasoning differed. Kannan Ramesh J, in delivering his view and the view of Anselmo Reyes IJ on this point, concluded that although the expert was

25 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [31].

26 [2021] 3 SLR 215 at [93]. Also see *Intercontinental Specialty Fats Bhd v Bandung Shipping Pte Ltd* [2004] SGHC 1 at [17]. *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415 was described by the Supreme Court of Western Australia in *Clack v Murray* [2018] WASCA 120 at [46] as "a leading authority in this area".

entitled to express her opinion on the reports and forecasts in reaching her opinion, these documents were not adduced "for the purpose of proving the truth of the underlying data upon which the opinions in the reports were based".[27] They observed that the issue was "the cogency and veracity of [the expert's] opinion based on these [documents], not the truth of any facts asserted in them".[28] The learned judges characterised the documents as general hearsay:[29] "'extrinsic material customarily employed' in valuation exercises".[30] Roger Giles IJ expressed the view that the documents were specific hearsay but were admissible pursuant to s 32(1)(*b*) of the Evidence Act[31] ("EA"), which is an exception to the hearsay rule.[32]

11 The case shows that it can be difficult to draw a line between general hearsay and specific hearsay. One could argue ("the first approach") that as the reports and forecasts included information about comparable companies which was not within the expert's personal knowledge and was not proved by a witness who had personal knowledge, and that information was substantially relied on for the purpose of valuing Dystar and Kiri Industries' shares (the primary facts in the case), those reports and forecasts were specific hearsay and consequently inadmissible. This argument is supported by the following observations of Megarry J in *English Exporters*:[33]

> … it seems to me quite another matter when it is asserted that a valuer may give factual evidence of transactions of which he has no direct knowledge, whether *per se* or whether in the guise of giving reasons for his opinion as to value. It is one thing to say 'From my general experience of recent transactions comparable with this one, I think the proper rent should be £x': it is another thing to say 'Because I have been told by someone else that the premises next door have an area of x square feet and were recently let on such-and-such terms for £y a year, I say the rent of these premises should be £z a year.' …
>
> … details of comparable transactions upon which a valuer intends to rely in his evidence must, if they are to be put before the court, be confined to those details which have been, or will be, proved by admissible evidence, given either by the valuer himself or in some other way. …

12 The assumption in these observations is that the expert is proving facts of which he has no knowledge. As the expert in *Kiri Industries* was relying on comparable transactions in the forecasts and reports, it

27 *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [100].
28 *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [100].
29 *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [100].
30 *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [101].
31 Cap 97, 1997 Rev Ed.
32 See para 12 below.
33 *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415 at 421 and 422.

could be argued that her opinion should not be admitted in the absence of admissible evidence of those transactions unless an exception to the hearsay rule applied. This was the view of Giles IJ in the case. In the learned judge's view, the reports and forecasts constituted specific hearsay and, therefore, were only admissible as an exception to the hearsay rule: "… the information [the expert] took from the reports significantly included historical financial information for the comparable companies and the industry. While forecasts were drawn from the information, they rested on it." The learned judge observed that it is a question of degree as to whether the external information is hearsay in the general sense (in which case, the hearsay rule is not applied strictly) or in the specific sense (in which case, the hearsay rule is applied strictly).[34] His Honour concluded that as the expert relied on the forecasts and reports as primary information that was critical to her opinion, the hearsay rule applied in its strict sense. The learned judge admitted these documents pursuant to s 32(1)(*b*)(iv) of the EA. It should be said that the learned judge did not consider ss 32B(1) and 32B(2) of the EA, which require the court to consider (for the purpose of determining the admissibility of out-of-court statements of opinion) whether the makers of the reports and forecasts would have had sufficient expertise to give direct oral evidence (under s 47(1) of the EA) had they been in court.[35]

13 An alternative approach ("the second approach")[36] is to regard the expert in *Kiri Industries* as relying on the reports and forecasts as part of the process of reaching an opinion. Here, she would not be proving the comparable transactions referred to in those documents as primary facts but simply giving evidence based on her belief that those transactions are comparable to the circumstances of *Kiri Industries*. The principle is that while an expert is not entitled to ground an opinion on unproven facts in issue in the case (as in *Gema Metal* and *Anita Damu*), he is permitted to consider related facts even if they have not been proved (as in the case of the statistics concerning glass in *Abadom*).[37] So, although Giles IJ was right in regarding the expert's reliance on comparable statistics of other companies as being highly significant to the valuation of Dystar and

34 *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [113].

35 Section 32B of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") is discussed at para 19 below. On another point, the required notice of hearsay was not given by the party seeking to rely on the reports and forecasts pursuant to s 32(4) of the EA. Roger Giles IJ decided not to exclude reports and forecasts under s 32(3) of the EA as the absence of the notice did not cause prejudice and it would have been costly and time-consuming to require witnesses to attend: See *Kiri Industries Ltd v Senda International Capital Ltd* [2020] 3 SLR 215 at [124].

36 The first approach is addressed at paras 11–12 above.

37 See paras 4 and 5 above.

Kiri Industries' shares in Dystar,[38] that comparable information was not specific hearsay because it did not constitute the primary facts in issue (the primary facts being Dystar's actual position and the value of the shares in that company). The position may be illustrated by a doctor who states his opinion in court on the medical condition of his patient based on the symptoms recounted by the patient to the doctor. The primary facts in the case are the symptoms as they show whether the patient had a particular condition. The doctor may give evidence of his opinion of the patient's condition premised on what the patient described to the doctor. What the patient said to the doctor does not prove the symptoms, which have to be established by admissible evidence.[39] However, the doctor is entitled to rely on what his patient recounted to explain the doctor's opinion.[40] Similarly, in *Kiri Industries*, the expert was entitled to rely on comparable information about other companies to explain her opinion even though that information did not prove the valuation of Dystar and the shares in that company.

14 If the expert in *Kiri Industries* was relying on the reports and forecasts not to prove the primary issues in the case but merely to give her opinion on the comparable statistics of other companies (professionally acquired information),[41] those reports and forecasts would be general hearsay. The court would then make up its own mind as to the weight the expert's opinion should have in deciding the primary issues in the case itself (the actual valuation of *Dystar* and the shares held in it). It is important to bear mind Menon CJ's test in *Anita Damu*, which is that an opinion is based on specific hearsay when an expert relies on information (not within his personal knowledge) about the disputed facts in the case and the truth of the information is contested.[42] In *Kiri Industries*, the facts stated in the reports and forecasts were not challenged by the opposing party.[43] This suggests that the truth of those facts were not in issue. Applying the above test in *Anita Damu*, the information relied on by the expert in *Kiri Industries* was general hearsay.

15 As pointed out by Kannan J in *Kiri Industries*,[44] "where an expert relies on information that he or she does not have personal knowledge

38 See para 12 above.
39 Normally by the patient himself or by medical records that are admissible pursuant to an exception to the hearsay rule.
40 See *R v Bradshaw* (1985) 82 Cr App R 79 and *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [33].
41 See para 1 above for the explanation of this phrase.
42 *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [31]. See para 8 above for the full extract.
43 See *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [100].
44 See *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [97].

of the key inquiry is one of *weight*, rather than admissibility" [emphasis in original]. The learned judge referred to Ritchie J's observation in *R v Lupien*[45] ("*Lupien*"):[46]

> [T]he fact that the methods pursued by the psychiatrist in reaching his opinion necessitated dependence on information obtained from the respondent and others which was not before the jury, does not make his opinion inadmissible although it may well be a factor to be considered *in assessing the weight to be attached to that opinion*. … [emphasis added by the court]

16 Kannan J pointed out that although *Lupien* involved psychiatric evidence in a criminal case, "the reasoning is applicable to expert evidence of any kind".[47]

III. Position under the Evidence Act and Rules of Court

17 The provisions in the EA are not entirely consistent with the common law. Indeed, there is no reference to the EA in any of the Singapore judgments which have considered the distinction between general and specific hearsay in the context of expert opinion. The relevant provisions to consider are ss 47, 48, 53 (read with O 40A of the Rules of Court[48] ("RoC")), 32, 60(1)(*d*), 32B and 62(2). Although s 47 governs the admissibility of expert testimony in court, it does not address the factual basis of the expert's evidence. Section 48 declares that facts which are not admissible in their own right are admissible if they "support or are inconsistent with the opinions of experts when such opinions are relevant". The word "support" might be interpreted as including the grounds on which the expert relies for his opinion. However, the grounds of the expert's opinion are regarded as admissible in their own right by s 53 of the EA. Section 48 is concerned with facts in general that are admissible if they substantiate or challenge the expert opinion or its underlying basis.[49]

18 Section 53 (which is entitled "Grounds of opinion when relevant") merely states: "Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant." This section applies to both expert and lay witnesses who give opinion evidence. As this section merely declares the relevancy of the grounds of the opinion, it does not compel the expert to state the grounds. However, as an opinion

45 [1970] SCR 263.
46 *R v Lupien* [1970] SCR 263 at 273.
47 *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215 at [98].
48 Cap 322, R 5, 2014 Rev Ed.
49 This is also borne out by the title of s 48 of the Evidence Act (Cap 97, 1997 Rev Ed): "Facts bearing upon the opinions of experts."

in the absence of proper grounds has little or no effect (as the validity of the opinion would not be established), experts and lay witnesses are expected to state them.[50] This principle is fortified by the RoC. Order 40A r 3(1)(*b*) of the RoC provides that the expert report must "give details of any literature or other material which the expert witness has relied on in making the report". Order 40A r 3(1)(*c*) of the RoC requires the expert report to "contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given". While these rules do refer to the grounds for the expert's opinion, neither they nor ss 48 and 53 distinguish between general and specific hearsay. In *Khoo Bee Keong v Ang Chun Hong*,[51] Andrew Phang JC (as he then was) expressed his concern about the lack of guidance in the EA on the basis of expert opinion.[52]

19 Turning now to the provisions governing hearsay, s 32(1) (which comes under the heading "Cases in which statement of relevant fact … is relevant") admits statements of relevant facts in separate sets of circumstances listed in ss 32(1)(*a*)–32(1)(*k*). A statement of a relevant fact is a statement which is adduced to prove the truth of that relevant fact. Therefore, s 32 is concerned with the exceptions to the hearsay rule.[53] Although the hearsay rule is not defined by the EA,[54] hearsay evidence is only admissible pursuant to a specific provision of the Act.[55] Therefore, if the expert relies on the truth of the facts stated in a document, that document is hearsay and must comply with the conditions of s 32. This was illustrated by Giles IJ in *Kiri Industries* where he concluded that the reports and forecasts were hearsay and admissible under s 32(1)(*b*)(iv). Sections 32B(1) and 32B(2) come into play where the document contains a statement of opinion. The effect of ss 32B(1) and 32B(2) is that an out-of-court statement of opinion is admissible pursuant to s 32(1) as if it were a statement of fact if the maker of the statement would be permitted (if called as a witness) to state that opinion in court.[56] In *Kiri Industries*,

50 This principle has been stated in many cases. For example, see *Anita Damu v Public Prosecutor* [2020] 3 SLR 825 at [30]; *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [68]; and *Sek Kim Wah v Public Prosecutor* [1987] SLR(R) 371 at [36].

51 [2005] SGHC 128.

52 See *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [68].

53 There are other specific exceptions including ss 33, 34 and 37–40 of the Evidence Act (Cap 97, 1997 Rev Ed). They do not need to be discussed in this article. For a leading case on the operation of s 32, see *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686.

54 As Steven's approach was not to incorporate exclusionary rules. See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 2020) ch 2.

55 See s 5 of the Evidence Act (Cap 97, 1997 Rev Ed).

56 Section 32B(1) of the Evidence Act (Cap 97, 1997 Rev Ed) states: "Subject to this section, section 32 applies to statements of opinion as they apply to statements of fact." Section 32B(2) states: "A statement of opinion shall only be admissible under

(cont'd on the next page)

s 32B ought to have been considered in conjunction with s 32(1)(*b*)(iv) for the purpose of admissibility of the reports and forecasts.[57]

20 The hearsay rule and exceptions just discussed are fortified by the rule of proof that oral evidence must be direct. Section 62(1)(*d*) specifically imposes this requirement on a witness giving his opinion or the grounds of his opinion: "Oral evidence must in all cases whatever be direct … (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds." The combined effect of ss 32 and 62(1)(*d*) in the context of an expert witness is that he must give his own opinion based on facts within his own personal knowledge or, if not within his personal knowledge, which are properly proved (normally under s 32). Another pertinent provision is s 62(2) of the EA, which states:

> The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

21 Section 62(2), which is a qualification to s 62(1)(*d*), limits out-of-court statements of opinion to those contained in a treatise, which is defined as "[a] written work dealing formally and methodically with a subject".[58] The work must be published and purchasable and the author must not be available for one of reasons stated in s 62(2). The assumption appears to be that if the author is available to give evidence, he should be called as a witness. Interestingly, s 62(2) may operate independently of expert testimony so that a court may refer to a treatise that complies with this provision in the absence of an expert witness.[59] This is not a common practice as it is often prudent to have the assistance of an expert for the purpose of explaining the specialised area of knowledge.[60]

22 It has been argued that s 62(2) "should not be interpreted as excluding the wide variety of other scholarly or practice-orientated materials (including books not commonly offered for sale, or no longer

---

section 32(1) if that statement would be admissible in those proceedings if made through direct oral evidence."

57 For the discussion of this point, see para 12 above.

58 This definition appears in *The New Shorter Oxford English Dictionary* (Oxford University Press).

59 For example, see *Wong Kai Woon v Wong Kong Hom* [2000] SGHC 176 at [53] (books were relied on by the court to ascertain the opinions of deceased authors concerning old marriage laws and customs in China).

60 See *Wong Kai Woon v Wong Kong Hom* [2000] SGHC 176 at [55] (particularly where, as in this case, foreign law is involved).

commonly offered for sale, or which are out of print, monographs, academic articles, conference papers and other work) which may support, challenge or otherwise throw light on expert evidence".[61] Whatever may have been the position in the 19th century (when s 62(2) was crafted),[62] in current-day litigation, experts refer to books and articles even if they do not comply with the conditions of s 62(2). Indeed, as has been mentioned,[63] O 40A r 3(1)(*b*) requires the expert to "give details of any literature or other material which the expert witness has relied on in making the report". No case has yet limited the terms "literature or other material" in O 40A r 3(1)(*b*) to treatises which comply with the strict conditions of s 62(2). Nevertheless, s 62(2), as it stands, may create unnecessary confusion and has the potential to generate litigation in the future.

IV. Proposals for reform

23 As has been shown, the common law distinction between general hearsay and specific hearsay, which has been endorsed by the Singapore courts, is not recognised by the EA.[64] Statements of relevant facts (statements tendered for the purpose of proving the facts referred to) are hearsay and, pursuant to s 5 of the EA, may only be admitted pursuant to the relevant provisions in this statute. Statements of relevant facts are admissible pursuant to s 32[65] and statements of opinion are admissible pursuant to s 32 read with s 32B. While s 53 provides that the grounds of an opinion given in court are relevant, it does not distinguish between expert witnesses and ordinary witnesses and provides no guidance on the scope of grounds that may be relied upon. Without the necessary specificity, it must be assumed that s 53 permits hearsay (whether general or specific) to be admitted only if s 32, 32B or some other exception to the hearsay rule applies.

24 If the EA is to be reformed to bring it in line with Singapore's case law, s 53 would need to be amended. Currently, s 53 states: "Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant." The following amendments to s 53 are proposed:

---

61 See Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 2020) at para 8.050.

62 This subsection appears as a proviso in s 60 of the Indian Evidence Act 1872 and in the Evidence Ordinance 1893 (Ord 3 of 1983).

63 See para 18 above.

64 See paras 17–22 above.

65 There are other provisions in the Evidence Act (Cap 97, 1997 Rev Ed) which admit hearsay including ss 33, 34, 37–40 and 147(3).

Section 53 (new)

(1) When the opinion of any witness is relevant, the grounds of that opinion are relevant facts.

(2) The relevant facts which constitute the grounds of an opinion must be proved by admissible evidence.

(3) An expert witness may rely on any statement of relevant facts or statement of opinion which make up the information which he has acquired in the course of his professional work and experience so that he may express his opinion effectively.

(4) Paragraph (3) does not entitle an expert witness to give evidence of any facts which are not within his personal knowledge for the purpose of directly proving any fact in issue or relevant fact.

(5) Notwithstanding paragraph (4), the court may permit the expert to give evidence of any facts which are not within his personal knowledge for the purpose of directly proving any fact in issue or relevant fact if it would be in the interests of justice to do so.

(6) For the avoidance of doubt, this section does not affect the admissibility of evidence under any other section of this Act.

25 Paragraph (1) expresses the substance of s 53 more succinctly. Paragraph (2) states the general rule that the facts relied on by an expert must be proved by evidence that is admissible. This requirement is not in s 53 even though the courts have consistently applied this principle.[66] Paragraph (3) permits general hearsay to be admitted in line with Singapore's case law. Paragraph (3) is subject to para (4) which prohibits specific hearsay in accordance with Singapore's case law.[67] Paragraph (4) is qualified by para (5) which grants the court a discretionary power to permit the expert to rely on specific hearsay if it would be just to do so. The rationale of the discretionary power is to permit the expert to ground his opinion on specific hearsay that is reliable and would not prejudice the other party. The proposed para (5) would provide the court with the necessary flexibility in exceptional circumstances. Paragraph (6) clarifies that other rules governing the admissibility for hearsay are not affected.

V. Conclusion

26 It might be asked whether the process of ascertaining the distinction between general and specific hearsay can be too difficult to be justified (as evinced by the differing views in *Kiri Industries*).[68] If so,

66 See paras 17 and 18 above.
67 See para 19 above.
68 See para 10 above.

should an expert be permitted to rely on specific hearsay to directly prove the primary facts in the case without the intervention of the hearsay rule? In the author's view, the case law principles distinguishing general and specific hearsay are clear enough, as has been explained in the context of *Kiri Industries*,[69] and this distinction is fully justified for several reasons.

27 First, the hearsay rule applies to civil and criminal cases in Singapore. In 2012, Parliament decided to retain the rule subject to broader exceptions. In his speech in the Second Reading of the Evidence (Amendment) Bill,[70] the Minister of Law stated: "There is still a core of sense, common sense, in the hearsay rule that, *prima facie*, as statement should not be admitted to prove the truth of its contents if its maker cannot be cross-examined as to its veracity."[71] This principle applies to all witnesses including experts. It would be contrary to the rationale of the hearsay rule and incongruous to abolish it in respect of facts recounted by an expert and to maintain it in respect of facts recounted by an ordinary witness. Given the importance of expert opinion to the outcome of a case and the consequential need to verify the underlying facts of his opinion, the hearsay rule has a vital role in ensuring that the primary facts on which the expert relies are properly proved.

28 Secondly, the hearsay rule does not prevent the admissibility of evidence which is within the scope of an exception. For example, any commercial, business, professional or occupational information relied on by the expert would normally be admissible pursuant to s 32(1)(*b*)(iv) of the EA including records containing multiple hearsay (as when the record includes statements of statements of other persons). Section 32(1)(*b*)(iv) admits multiple hearsay in documents containing information and does not require the compiler of the record or any supplier of information contained to be unavailable to testify as a witness.[72] Therefore, the rule is sufficiently broad to admit most official communications.

29 Thirdly, in the absence of a rule against hearsay, experts may rely on questionable information when opinion is based on the facts in issue in the case. Such an outcome would exacerbate the difficulties which arise from the very real problem of expert bias.[73] And, even though a judge may be able to sift through all the information for the purpose of determining

69 See paras 10–13 above.

70 The bill was read for the first time in 2011. It became the Evidence (Amendment) Act 2012 (Act 4 of 2012).

71 *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at col 45 (K Shanmugam, Minister for Law).

72 See para 12 above.

73 For a discussion of the problem of expert bias, see Jeffrey Pinsler SC, "Expert Evidence and Adversarial Compromise: A Reconsideration of the Expert's Role and

(cont'd on the next page)

the weight of the evidence, he would not have the benefit of the procedures and safeguards provided by ss 32 and 32C in relation to hearsay evidence admissible under s 32(1). These include the requirement of notice to the opposing party[74] so that he is able to prepare his cross-examination and to challenge the credibility of the maker of the hearsay statement[75] (as well as any person who supplied information from which the statement was made),[76] and the veracity of the evidence itself.[77] Additionally, the court has a specific discretion to exclude admissible hearsay evidence which it would exercise if it is shown to be wholly unreliable.[78] These procedures and safeguards (which would not apply if the hearsay evidence is not subject to the hearsay exceptions) enable the court to properly manage issues of admissibility and weight. Moreover, as the parties (through their lawyers) would be aware of these provisions, prudence would require them to advise their respective experts concerning the integrity and quality of the evidence they intend to rely on. In this way, the quantity of information put before the court would be controlled with the result that time and expense would be saved.

Proposals for Reform" (2015) 27 SAcLJ 55 and Jeffrey Pinsler SC, "Expert's Duty to Be Truthful in the Light of the Rules of Court" (2004) 16 SAcLJ 407.

74 See s 32(4) of the Evidence Act (Cap 97, 1997 Rev Ed).

75 See ss 32C(1)(*a*), 32C(1)(*b*) and 32C(2) of the Evidence Act (Cap 97, 1997 Rev Ed).

76 See s 32C(3) of the Evidence Act (Cap 97, 1997 Rev Ed).

77 See ss 32(5) and 32(1)–32(3) of the Evidence Act (Cap 97, 1997 Rev Ed).

78 See *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686. In *Kiri Industries Ltd v Senda International Capital Ltd* [2021] 3 SLR 215, Roger Giles IJ, having admitted the evidence under s 32(1)(*b*)(iv), decided not to exercise his discretion to exclude the forecasts and reports. See para 12 above.