

## EXPERT EVIDENCE AND ADVERSARIAL COMPROMISE

### A Re-Consideration of the Expert's Role and Proposals for Reform

The practice governing the adduction and presentation of expert evidence has come under increasing scrutiny in recent years. Bias, untruthfulness, disproportionate and excessive costs, party manipulation, delays and obfuscation of issues are some of the problems which the courts and litigants have had to endure as a consequence of the adversarial nature of civil proceedings. The purpose of this article is to examine these concerns and propose measures which would improve the legal infrastructure. In particular, more extensive judicial involvement in controlling the use of expert evidence through comprehensive pre-trial case management and at trial is advocated. It is also proposed that experts should be jointly instructed by the parties unless the circumstances of the case require the parties to appoint their own experts. This scheme would be complimented by a more enhanced role for the “court expert”, whose appointment would not depend on the consensus of the parties. Further, it will be shown that the legal admissibility of expert evidence is not the only criterion for its reception. Ultimately, the court must exercise its discretion in determining whether expert evidence (whatever form it takes) is justified by the circumstances of the case (primarily, the principle of proportionality must be adhered to). The proposals are summarised in the final two paragraphs of this article.

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#### I. Introduction

1 The aims of this article are to examine the legal infrastructure governing expert testimony, to identify the challenges it poses to interests of the administration of justice and, consequently, to propose measures for reform. It will be seen that there are three main categories of persons who may give evidence in areas requiring special knowledge: an expert witness appointed by a party (a “party’s expert”), an expert witness appointed by the court (a “court expert”), and an assessor

(who, although not a witness, assists the court in specific types of cases). The approach here will be to analyse the issues raised by the testimony of a party's expert and the role of the court expert, to consider the current legislative framework and the state of practice in the courts (including a review of the relationship between the evidential provisions in the recently amended s 47 of the Evidence Act<sup>1</sup> ("EA") and the rules of procedure), and to evaluate possible reforms. Particular consideration will be given to the introduction of an expert who is jointly instructed by the parties (a "jointly-instructed expert"), an enhanced role for the court expert, and a more comprehensive system of pre-trial case management in order to enhance the court's ability to thoroughly review the need for expert testimony, the type of expert who should be appointed (if any), and the directions to be given. Developments in some other leading common law jurisdictions which have revised the traditional adversarial model will also be considered.

## II. Issues raised by modern expert testimony

2 One might assume that persons who are professionally or experientially qualified to express an accurate opinion concerning a matter within the scope of their common expertise are unlikely to differ substantially (if at all) in their conclusions on a matter of established knowledge. Yet, the reality in practice is that most cases involving expert evidence (very possibly the majority) are characterised by irreconcilable differences between the expert witnesses, whose opinions invariably support the interests of the parties who call them. In *Vita Health Laboratories Pte Ltd v Pang Seng Meng*<sup>2</sup> ("Vita Health"),<sup>3</sup> V K Rajah JC (as he then was) agreed with the following proposition:<sup>4</sup>

... in many respects the incentives for experts to favour one party contrary to their actual belief are substantial. First, expert witnesses are paid for their evidence. Secondly, they may be retained on a regular basis by a particular client or group of clients in different cases. Thirdly the expert may hope to gain favour with a client generally, perhaps because he hopes that non-legal professional engagements may be forthcoming or continue.

His Honour added that "[b]ias could also include any perceived partiality or inclination to make suppositions or assumptions in favour of an instructing party".<sup>5</sup> Additionally, an expert is not uncommonly selected because his views on an area of knowledge are already known

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1 Cap 97, 1997 Rev Ed.

2 [2004] 4 SLR(R) 162.

3 [2004] 4 SLR(R) 162 at [81].

4 From Tristram Hodgkinson, *Expert Evidence: Law & Practice* (Sweet & Maxwell, 1990) at p 213.

5 *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [81].

and, consequently, would advance the party's case. This mode of selection has the potential to compromise the interests of justice to the extent that it may solicit polarised views and avoid more objective opinions. Often, a "market-place" mentality prevails. The following account by Sir George Jessel MR in *Thorn v Worthing Skating Rink Co*<sup>6</sup> illustrates the difficulties:

... the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half-a dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? [A]nd he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme case no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.

3 Although these views were expressed in the 19th century, they reflect modern practice as well. Parties often call experts (and frequently compete for the very best of them, if expense is not an issue) primarily to bolster their respective cases with a view to a favourable judgment. In most instances, the expert may be characterised as a "weapon" engaged by the party as a combatant in the adversarial arena rather than as a witness whose fundamental duty is to assist the court.<sup>7</sup> Yet, the original purpose of expert testimony was simply to objectively assist the court in deciding issues beyond its knowledge regardless of the positions taken by the parties.<sup>8</sup>

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6 (1877) 6 Ch D 415 at 416.

7 Experts have even been referred to as "hired guns". See the reference to this phrase in H K Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1995) at p 183.

8 See para 14 below.

4 The role of the expert has prompted unfavourable observations by the courts in a series of cases during the last ten years, despite the introduction of O 40A of the Rules of Court<sup>9</sup> (“ROC”) in 2000.<sup>10</sup> For example, in *Vita Health*,<sup>11</sup> V K Rajah JC (as he then was) remarked: “An expert ... should not evolve into a spokesperson for his client.”<sup>12</sup> In the same vein, his Honour observed in *Pacific Recreation Pte Ltd v S Y Technology Inc*: “The expert should neither attempt nor be seen to be an advocate of or for a party’s cause. If he appears to do this, he will inexorably lose his credibility. ... In essence, his advocacy is limited to supporting his independent views and not his client’s cause.”<sup>13</sup> The same sentiment was expressed by Sir George Jessel MR more than a century ago: “Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.”<sup>14</sup> The Court of Appeal resignedly acknowledged the tendency towards bias in *JSI Shipping (S) Pte Ltd v Teofoongwonglclong*<sup>15</sup> (“*JSI Shipping*”): “... a certain degree of partisan advocacy may be an inevitable consequence of adducing expert evidence in the *gladiatorial* context of an adversarial system” [emphasis added]. The observation of the High Court Judge concerning an expert witness in *Gimpex Ltd v Unity Holding Business Ltd*<sup>16</sup> was as follows: “... I found [the expert] to be overly biased ... in complete disregard of the duties of an expert under O 40A of the Rules.” In *Khoo Bee Keong v Ang Chun Hong*,<sup>17</sup> Andrew Phang JC (as he then was) commented on certain judicial statements declaring the expert’s responsibilities to the court as follows: “... one cannot be faulted for [taking such statements] with the proverbial pinch of salt, especially when one views [them] through the lenses of practical reality”.<sup>18</sup> Put another way, exhortations by the judge (and even legislation) may not always have the desired result given the compelling force of human nature. Reflecting on the need for litigants to adopt the proper mindset towards their expert witnesses, his Honour stated: “The real and effective solution to the difficulties centring on the alleged bias of experts probably lies in the sphere of the extra-legal and this, in itself,

9 Cap 322, R 5, 2006 Rev Ed.

10 For the genesis of O 40A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), see para 11 below.

11 *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [82].

12 This statement was reiterated in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [70].

13 *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [70].

14 See *Abinger v Ashton* (1873) 17 LR Eq 358 at 374.

15 [2007] 4 SLR(R) 460 at [63].

16 [2013] SGHC 224 at [214].

17 [2005] SGHC 128.

18 *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [84], commenting on cases cited at [83].

reflects, once again, the almost natural intractability that especially characterises the law relating to expert evidence.”<sup>19</sup> More recently, the Court of Appeal reiterated these observations<sup>20</sup> and acknowledged that “the area of expert evidence generally is in need of re-examination”.<sup>21</sup>

5 Quite apart from the problem of bias, there is also the pressing concern in modern litigation about disproportionately high costs which are usually incurred in the preparation and presentation of expert testimony, often in circumstances when it is not justified by the resources needed for this purpose. Expert evidence may also have the effect of unnecessarily complicating the issues before the court so that it is counter-productive rather than helpful to the adjudicative process.<sup>22</sup> And, as pointed out by the Court of Appeal in *JSI Shipping*,<sup>23</sup> even the parties might suffer: “we must emphatically reiterate that the court will not hesitate, in the an appropriate case, to disregard or even draw an adverse inference against expert evidence that exceeds the judicially determined boundaries of coherence, rationality and impartiality”. The current legal infrastructure requires further development to ensure that the interests of the administration of justice are not compromised by untruthfulness, unnecessary expenditure, extravagant use of trial time and the obfuscation of issues.

6 Prior to reviewing the state of the law and considering how it might be reformed, it would be useful to gain a sense of the problem by examining two recent cases as examples of different factual scenarios. The first case, *Wong Meng Cheong v Ling Ai Wah*,<sup>24</sup> involved a family dispute over the transfer of property and related issues. One of the main questions was whether the transferor had the mental capacity to effect the transfer. The parties called their own experts to give their opinions on his medical condition. The High Court found that the two experts called by the plaintiffs had failed to disclose their “fairly close relationship”<sup>25</sup> with the latter in their reports.<sup>26</sup> Apart from the appearance of bias, the court found that both experts “did display

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19 *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [85]. Also see *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [44], where his Honour stated: “The difficulties engendered by the issue of *bias* with regard to experts for the respective parties are, unfortunately, perennial in nature.” [emphasis in original]

20 See *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [44], citing *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [84].

21 See *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [44], citing *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [87].

22 See *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [200]. See para 7 below.

23 *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460 at [63].

24 [2012] 1 SLR 549.

25 At both a personal and professional level.

26 As required by O 40A r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). See *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [58]–[62].

instances of partiality to the plaintiffs' case ... by being selective in the presentation of the relevant medical evidence".<sup>27</sup> Furthermore, they failed to comply the directions in the rules requiring various details to be included in the expert report. Both "had merely provided the court with their factual accounts of consultations with [the transferor] and stated their bare conclusions in support of the plaintiffs' case".<sup>28</sup> One of the experts had based his opinion on "incomplete information".<sup>29</sup>

7 Ultimately, "neither of the plaintiffs' experts was able to give a reliable expert opinion on the issue of [the transferor's] mental capacity".<sup>30</sup> Consequently, the High Court merely took into account the "factual aspects of the evidence" and rejected the opinions contained in both the experts' reports.<sup>31</sup> This conclusion raises the question of whether the interests of the administration of justice would have been better served by calling the plaintiffs' two expert witnesses as witnesses of fact (on the basis of their experience as the transferor's treating physicians),<sup>32</sup> and arranging for an entirely independent expert<sup>33</sup> to testify on the basis of the factual evidence (including the medical records and reports). An even more constructive approach might have been to apply to the court to appoint a court expert pursuant to O 40 of the ROC. The court expert could have been nominated by the plaintiffs and the first defendant (who called her own expert) or, in the absence of agreement, by the court.<sup>34</sup> Instead, the case was further complicated by additional expert opinions in the affidavits of the evidence-in-chief of two of the plaintiffs' factual witnesses who were medical doctors.<sup>35</sup> The court observed: "This resulted in much wasted costs since the defendants' counsel had to deal with four experts' opinions, none of which were useful."<sup>36</sup>

8 The second case, *Mühlbauer AG v Manufacturing Integration Technology Ltd* ("Mühlbauer AG"),<sup>37</sup> involved a wholly different set of facts pertaining to a patent dispute. The plaintiff claimed infringement of his patent the validity of which was challenged by the defendant, who counterclaimed for a declaration of invalidity and an order that the

27 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [63]. They had highlighted only material which supported the plaintiff's case and omitted to mention matters adverse to it (*Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [63]–[68]).

28 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [69]–[70].

29 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [75].

30 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [73].

31 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [75]. However, the court did take into account the factual aspects of the evidence of the two experts.

32 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [55].

33 *Ie*, a person who was not personally or professionally acquainted with the transferor.

34 See O 40 r 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

35 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [200].

36 *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549 at [200].

37 [2009] SGHC 45 (HC), [2010] 2 SLR 724 (CA).

patent be revoked. In dismissing the claim and granting the remedies sought by the defendant,<sup>38</sup> the High Court placed considerable reliance on the opinion of the defendant's expert, who had extensive experience in the semiconductor technology in issue.<sup>39</sup> The Court of Appeal considered the argument of the plaintiff's counsel that as the defendant's expert was "one of the actual inventors of the machine which constituted the subject matter of the Respondent's (and, more importantly, opposing) patent", his opinion ought to have been considered in this light.<sup>40</sup> In the course of delivering the judgment of the Court of Appeal, Andrew Phang JA considered that the problem of bias required a review of the law governing experts in patent and other cases generally and added:<sup>41</sup>

In the meantime, however, it may well be wise and prudent for the parties concerned in future cases (especially of this nature) to apply to the court to appoint an impartial and objective expert (whose views they would agree to abide by) pursuant to O 40 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (which permits the court to appoint one or more independent experts on the application of any party which, under O 40 r 1(2) 'shall, if possible, be a person agreed between the parties and, failing agreement, shall be nominated by the Court'). It should, however, also be noted that this same Rule also permits the court to appoint one or more independent experts 'on its own motion', although, in the nature of things (particularly in patent disputes), this particular avenue will probably prove to be less than practical.

9 *Mühlbauer AG* is the first case in which the Court of Appeal has expressly advocated the use of an independent expert (as opposed to an expert called by a party) for the purpose of assisting the court. These observations will be examined subsequently in the context of proposals for reform.<sup>42</sup> *Mühlbauer AG* is also a leading authority for its guidelines concerning the manner in which cases should be presented on appeal.<sup>43</sup>

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38 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2009] SGHC 45 at [49].

39 Note the Court of Appeal's observations at *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [12] and [46].

40 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [46] [emphasis in original omitted]. However, although the Court of Appeal did not think that the expert evidence was critical to the case, it was helpful in explaining the claims in respect of the patents (*Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [47]).

41 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [45].

42 The Court of Appeal allowed the appeal.

43 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [109]–[113].

### III. Current legislative framework and state of practice

#### A. *Admissibility under the Evidence Act*

10 The admissibility of expert evidence is primarily governed by s 47 of the EA. As provided by s 47(1), the conditions are the opinion must be “upon a point of scientific, technical or other specialised knowledge” and that the court “is likely to derive assistance” from that opinion.<sup>44</sup> Furthermore, pursuant to s 47(3), the opinion is relevant and admissible even if it “relates to a matter of common knowledge”. That is, an expert may give evidence of his opinion on a matter if that opinion would assist the court, even if the matter lies in an area which is generally known. For example, the evidence of an accident reconstruction expert may be admissible even though the court might understand the general circumstances of the accident. The condition is that the expert can add to or enhance that understanding and thereby assist the court.<sup>45</sup> The expert is defined by s 47(2) as “a person with such scientific, technical or other specialised knowledge based on training, study or experience”.<sup>46</sup> The admissibility of expert evidence is qualified by s 47(4) of the EA, which empowers the court to exclude expert evidence if it would be in the interests of justice to do so. This provision was introduced as a counter-measure to the expanded scope of admissibility consequential upon the broadening of the terms of s 47(1) and the abrogation of the common knowledge rule by s 47(3).<sup>47</sup> The important question of whether s 47 ought to be supported by new case management provisions will be considered in the course of this article.<sup>48</sup> Other provisions which relate to expert testimony concern the admissibility of facts which support or are inconsistent with the expert evidence<sup>49</sup> and the grounds on which the expert relies for his opinion.<sup>50</sup>

#### B. *Party’s expert*

11 Apart from certain orders or directions which may have been made or given in relation to expert evidence on the summons for

44 Evidence Act (Cap 97, 1997 Rev Ed) s 47(1).

45 See *Khoo Bee Kiong v Ang Chun Hong* [2005] SGHC 128. The case was decided prior to the introduction of s 47(3) by the Evidence (Amendment) Act 2012 (Act 4 of 2012). The impact of s 47(3) of the Evidence Act is considered in J Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) ch 8.

46 Also, see O 40A r 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

47 The new provisions in s 47 of the Evidence Act (Cap 97, 1997 Rev Ed) are considered in considered in J Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) ch 8.

48 See paras 19–23 below.

49 See s 48 of the Evidence Act (Cap 97, 1997 Rev Ed).

50 See s 53 of the Evidence Act (Cap 97, 1997 Rev Ed). Also see ss 62(1)(d) and 62(2) of the Evidence Act.

directions,<sup>51</sup> there was not to be a comprehensive set of provisions concerning such testimony until the introduction of O 40A in 2000.<sup>52</sup> The predominant procedural provisions which govern the adduction of expert evidence are to be found in O 40A and specific rules in O 25.<sup>53</sup> In addition to the directions concerning witnesses generally,<sup>54</sup> the court will determine on the summons for directions whether an order should be made limiting the number of expert witnesses,<sup>55</sup> whether the evidence-in-chief of each expert witness should be set out in a single affidavit,<sup>56</sup> whether any direction should be made for a discussion between the experts prior to the exchange of their affidavits exhibiting their reports for the purpose of requiring them to identify the issues in the proceedings and to reach an agreement if possible,<sup>57</sup> the period within which objections to the contents of the affidavit or other evidence of a witness must be taken,<sup>58</sup> and whether any orders should be made, *inter alia*, pursuant to O 40A r 1 to O 40A r 4.<sup>59</sup> Order 40A re-expresses the court's power to limit the number of expert witnesses,<sup>60</sup> sets out principles regarding the expert's duty to the court<sup>61</sup> and consequential requirements relating to his evidence,<sup>62</sup> and prescribes procedures for putting questions to witnesses<sup>63</sup> and for discussion between experts.<sup>64</sup> In 2012, a new procedure was introduced in response to the difficulties

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- 51 See, in particular, O 25 r 3(1) and Form 44 of Appendix A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The relevant orders and directions are considered subsequently in this paragraph.
- 52 By the Rules of Court (Amendment) Rules 2000 (S 613/2000). These Rules are examined in J Pinsler, "Expert's Duty to be Truthful in the Light of the Rules of Court" (2004) 16 SAclJ 407 (cited in *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [44]).
- 53 Also note O 34A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) concerning directions which the court may give in the course of pre-trial conferences.
- 54 In particular, directions concerning the disclosure of affidavits of the evidence in chief (see O 25 r 3(1)(a) and O 25 r 8(1)(b) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) and the mode in which evidence may be given and disclosed before trial, if the court permits an alternative process of adducing evidence (see O 25 r 3(1)(c) of the Rules of Court). The directions set out in Form 44 of Appendix A of the Rules of Court may be given by the court pursuant to O 25 r 1 of the Rules of Court.
- 55 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 25 r 3(1)(d).
- 56 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 25 r 3(1)(e).
- 57 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 25 r 3(1)(f). In the event that a direction is made, the court would consider whether (a) to specify the issues which the experts are to discuss; and (b) to direct the experts to prepare a joint statement indicating the agreed issues, the issues not agreed and a summary of the reasons for any non-agreement.
- 58 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 25 r 3(1)(g).
- 59 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 25 r 3(1)(h).
- 60 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A r 1(1). Also see O 25 r 3(1)(d), which is referred to in n 55.
- 61 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A r 2.
- 62 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A r 3.
- 63 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A r 4.
- 64 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A r 5.

caused by the conflicting testimonies of multiple experts.<sup>65</sup> It enables experts to testify as a panel or to give their evidence concurrently so that their testimonies may be scrutinised more carefully through examination and discussion.<sup>66</sup> Order 40A was originally crafted on the basis of selected provisions in Pt 35 of the Civil Procedure Rules<sup>67</sup> (“CPR”) and the accompanying Practice Direction 35, which had recently come into force in England.<sup>68</sup> However, it did not adopt certain key approaches of the CPR, such as the requirement that it is for the court to decide whether expert evidence ought to be permitted and the concept of a jointly-instructed expert. The viability of these developments, and their potential application to Singapore, will be considered.<sup>69</sup>

12 The current position in Singapore is that if a party believes that the conditions in s 47 of the EA are satisfied in respect of one or more issues in a case, he may adduce expert evidence at trial.<sup>70</sup> Although the procedural conditions for the presentation of expert testimony must be complied with,<sup>71</sup> and the court may limit the number of expert witnesses to be called in any particular case,<sup>72</sup> it is not expressly empowered to prohibit expert evidence altogether in the course of pre-trial case management.<sup>73</sup> This means that a party is entitled to call at least one expert witness if the court “is likely to derive assistance” from the latter’s opinion in accordance with the terms of s 47(1).<sup>74</sup> This is the position notwithstanding any concerns which the court might have concerning the justification of expert testimony.<sup>75</sup> Although the court has the discretion to exclude expert evidence in the interests of justice pursuant to s 47(4) of the EA,<sup>76</sup> this provision (which is a rule of evidence)

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65 Order 40A r 6 was introduced by the Rules of Court (Amendment) Rules 2000 (S 75/2012).

66 For a fuller account, see J Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2012) at para 19.024 and the commentaries to O 40 r 6 in *Singapore Court Practice 2014* (J Pinsler gen ed) (LexisNexis, 2014) and *Singapore Civil Procedure 2015* (G P Selvam gen ed) (Sweet and Maxwell, 2015).

67 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK).

68 In 1998.

69 See para 19 ff below.

70 Unless the court concludes that the terms of s 47 of the Evidence Act (Cap 97, 1997 Rev Ed) have not been satisfied.

71 See the Explanation and Illus (b) to s 5 of the Evidence Act (Cap 97, 1997 Rev Ed).

72 See O 25 r 3(1)(d) and O 42 r 1(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

73 Subject to its general powers under O 34A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to make any order which it considers necessary.

74 See para 10 above.

75 Also see O 40 r 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which concerns a party expert who is called in addition to a court expert, to the same effect.

76 Introduced by the Evidence (Amendment) Act 2012 (Act 4 of 2012). Section 47(4) of the Evidence Act (Cap 97, 1997 Rev Ed) is considered in para 10 above.

concerns the admissibility of expert testimony at trial and not pre-trial case management, which must be governed by rules of procedure. The subject of case management is examined in a subsequent part of this article.<sup>77</sup>

### C. Court expert

13 The process of presenting the evidence of a court expert did not evolve in its own right as much as a reaction to the difficulties associated with the party's expert. Indeed, the principle of a court-appointed expert was developed centuries before the emergence of the party's expert in response to the evolving adversarial culture of later times. Historical records show that it was the court, not the parties, which took the initiative of calling persons with expertise or special knowledge concerning a matter which was before it.<sup>78</sup> As the common law process evolved in response to societal changes and newer ideas of justice, the courts gradually exerted less control over the proceedings, leaving the parties and their advocates with the responsibility of ensuring that relevant evidence (including expert testimony) was presented to the court.<sup>79</sup> In England, the first rules governing the appointment of a court expert were introduced through O 37A of the English Rules of the Supreme Court, 1934. The objective of this new Order was said:<sup>80</sup>

... to enable the parties to save costs and expenses in engaging separate experts in respect of a technical or scientific question which can be resolved fully, quickly and comparatively cheaply by an independent expert appointed by the court, and also possibly to prevent the court being left without expert assistance in cases in which the experts of the parties may well be giving entirely contradictory evidence ...

The provisions were applied to Singapore through O 40 of the Rules of the Supreme Court in 1970, the same Order in the current ROC.<sup>81</sup>

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77 See paras 19–23 below.

78 See L Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harv L Rev 40; C T Moodie, "Expert Testimony – Its Past and Its Future" (1937) 11 ALJ 210. For an example of judicial initiative with regard to expert testimony in a case from the 16th century, see *Buckley v Rice Thomas* (1554) 1 Plowd 118 at 125; 75 ER 182 at 192.

79 See L Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harv L Rev 40. Interesting observations may also be found in C Jones, *Expert Witnesses: Science, Medicine and the Practice of the Law* (Clarendon Press, 1994) at pp 35–38.

80 *The Supreme Court Practice 1982* vol 1 (I H Jacob gen ed) (Sweet & Maxwell, 1981) at para 40/1-6/1.

81 As will be explained, the Order has been amended in certain respects.

14 The advantages of the court expert are obvious. The risk of partiality, which is ever-present when the parties call their own witnesses, is eliminated. The costs of appointing individual experts, the time necessary to present their evidence to the court, and the burdens of having to adjudicate a case in face of conflicting expert testimony (as a result of bias) are not in issue. And the agreement of the parties to consider (if not accept) the evidence of the court expert means significantly less acrimony to the advantage of the proceedings as a whole. Maugham LJ observed in *Fishenden v Higgs and Hill Ltd*<sup>82</sup> that “a great amount of expense” and “a great deal of time” is wasted by experts who espouse opposing views and that such adverse consequences could be avoided by a court expert who would be able to “help the court very materially in deciding the case”. Despite these benefits, the reported cases in the recent past show that court experts are appointed exceptionally, when the subject matter is relatively simple or a judge manages to encourage the parties to agree to a court expert. Even then, litigants have often insisted on calling their own experts to provide views which contrast with that of the court expert.<sup>83</sup>

15 There are many reasons why a party and his lawyer may resist the appointment of a court expert. It is a truism that a party almost always feels more secure and confident if “his own” expert gives evidence. While the ordinary party may appreciate that even his own expert must “tell the truth”, he has comfort in believing (even if such a belief has no foundation) that his remuneration of the expert justifies a measure of loyalty that will somehow manifest to his advantage in the determination of the case before or at trial.<sup>84</sup> The party’s need of an expert becomes all that more imperative (in the sense of not being “outdone”) when the opposing party has appointed his own expert. Lawyers generally prefer to engage party experts (rather than rely on a court expert) so that they can exercise their choice as to who would be the most appropriate candidates for the purpose of the case. Lawyers also have the opportunity to prepare their experts for trial with a view to eliciting the evidence in the best possible light and bolstering their clients’ cases. Unfortunately, despite the clear import of the Legal Profession (Professional Conduct) Rules,<sup>85</sup> not all lawyers appear to be able to resist the temptation to influence or shape their experts’

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82 [1935] All ER Rep 435 at 452.

83 For example, see *Teo Geok Fong v Lim Eng Hock* [1999] SGHC 209 at [6]; *Yogambikai Nagarajah v Indian Overseas Bank* [1995] SGHC 262 (HC), [1996] 2 SLR(R) 774 (CA) at [25]. Under O 40 r 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), a party may call his own expert when a court expert has been appointed, if the conditions in this rule are satisfied. Order 40 r 6 is examined in paras 43–44 below.

84 Perhaps in the way he answers questions or, at least, where the instructing party might be given the benefit of the doubt.

85 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed).

testimony. Perhaps the problem was best summed up in *In re Saxton, Decd*,<sup>86</sup> where Lord Denning, having commented on the infrequency of appointment of court experts as “a rare thing for it to be done”, stated: “I suppose that litigants realise that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands.” Therefore, it is not surprising that Andrew Phang JA recently encouraged parties to engage the procedure for appointing court experts to avoid the difficulties associated with experts separately instructed by the parties.<sup>87</sup>

16 Order 40 was amended for the first and last time in 2000 to enable the court to appoint an expert (or experts) “on its own motion” pursuant to O 40 r 1(1) of the ROC.<sup>88</sup> Under this Order, the parties are given the option of agreeing to the court expert. Failing such consensus, the court may nominate the relevant person.<sup>89</sup> The power of the court to appoint an expert on its own initiative, which was generated by the same amendment rules which had introduced O 40A (in relation to a party’s expert),<sup>90</sup> was most likely intended to encourage the more extensive use of court experts. However, there has yet to be a reported case in which a court expert was appointed over and above the objections of the parties. It is difficult to envisage how a judicial power to appoint experts without more could have changed the position. First, the adversarial culture of party-appointed experts is regarded as almost sacrosanct with the consequence that judicial intervention is discouraged. Secondly, the pre-trial infrastructure which supports the appointment of a court expert is limited. Although O 40 does provide for various matters such as reports, experiments and tests and cross-examination,<sup>91</sup> it does not set up the case management process for the appointment of a court expert. Order 25 makes no reference whatsoever to court experts, although it is replete with provisions concerning parties’ experts. In fact, O 25 r 3(1)(h) of the ROC (which is the residuary provision for orders and directions made on the summons for directions) specifically refers to orders which may be made under O 40A r 1 to O 40A r 4 (as well as other Orders) but makes no mention whatsoever of O 40. The position may be contrasted to proceedings in chambers in respect of which the court may simply appoint a court expert or assessor if it considers it

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86 [1962] 1 WLR 968 at 972.

87 See *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 (which is first considered in para 8 above).

88 By the Rules of Court (Amendment) Rules 2000 (S 613/2000). The other amendment introduced by S 613/2000 concerned the re-wording and re-positioning of the clause referring to the court expert in a new para (1A) of O 40 r 1 of the Rules of Court.

89 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 40A r 1(2). This was also the position prior to the amendment.

90 See paras 11–12 above.

91 See O 40 rr 2–4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), respectively.

“expedient in order to enable it to better to determine any matter”.<sup>92</sup> The problem is exacerbated by the fact that parties often appoint their own experts early on in the case (perhaps even before any dispute has arisen) with the effect that they become familiar with each other and establish a close professional relationship. The reluctance to give up their experts in favour of an unknown individual to be appointed by the court is understandable. However, as pointed out earlier, the purpose of introducing an Order governing the appointment of court experts was to avoid biased testimonies and excessive costs associated with experts called by the parties.<sup>93</sup>

#### D. Court-appointed assessors

17 As in the case of expert witnesses, the judicial practice of appointing “assessors” has a long history. The fundamental difference between the former and latter is that the expert witness gives evidence, while the assessor sits with the court as an adviser on an area requiring special knowledge. Assessors are not called by the parties and do not give evidence. They cannot be examined by the parties. They are strictly advisers, although the judgment is the sole responsibility of the court.<sup>94</sup> Section 10A(1) of the Supreme Court of Judicature Act<sup>95</sup> and s 33(1) of the State Courts Act<sup>96</sup> state that the court may, “if it thinks fit” on the application of any party, or on its own motion, obtain the assistance of one or more persons of “skill and experience” concerning the issues in the case. Order 33 r 4 of the ROC<sup>97</sup> states the function of assessors<sup>98</sup> and formulates the procedure for their involvement including the notification to the parties. Therefore, the court is to notify each party in writing of the name of the proposed assessor and his qualification at

92 See O 32 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

93 See para 4 above.

94 In *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR(R) 375, Choo Han Teck JC (as he then was) endorsed Brett MR’s proposition in *The Beryl* (1884) 9 PD 137 that assessors assist the judge but do not take part in the judgment, and are not responsible, for it: “The use of an assessor is a privilege of the court. And the privilege of the assessor is that his errors will only be exposed through the judgment, or else be buried with it” (at [6]). Furthermore, an assessor’s input or advice is not evidence upon which the parties are entitled to examine for he is not a witness (at [7]); and see *Richardson v Redpath, Brown & Co Ltd* [1944] AC 62 at 70). Also see A Dickey, “The Province and Function of Assessors in English Courts” (1970) 33 *Modern Law Review* 494.

95 Cap 322, 2007 Rev Ed. Also see s 30(4) which applies s 10A to hearings before the Court of Appeal.

96 Cap 321, 2007 Rev Ed.

97 See O 33 r 4(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which refers to the relevant statutory provisions.

98 Order 33 r 4(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) states: “The assessor shall assist the Court in dealing with a matter in which the assessor has skill and experience.” Order 33 r 4(3) provides: “An assessor shall take such part in the proceedings as the Court may direct.”

least 14 days before his appointment.<sup>99</sup> Any party may object to the appointment of the proposed assessor on the basis of his qualifications or on personal grounds.<sup>100</sup> If he does object, he must so state in writing and file his challenge within seven days of receipt of the notification by the court.<sup>101</sup> The objection is to be considered by the court in determining whether the person ought to be appointed.<sup>102</sup>

18 Assessors have been primarily used in admiralty cases<sup>103</sup> although, as the above statutory provisions indicate, an assessor may be appointed whenever the court needs to rely on expert knowledge.<sup>104</sup> Although it might be argued that the appointment of an assessor would compromise adversarial justice in that his advice and opinions cannot be tested by the parties through examination and that the court may over-rely on the assessor's input,<sup>105</sup> there may be circumstances in which his involvement as an adviser to the court may be justified.<sup>106</sup> For example, in *Mühlbauer AG*<sup>107</sup> (concerning particular issues of patent law), it was suggested by counsel that the appointment of an assessor might be appropriate in specialised cases such as the one before the court.<sup>108</sup> The court commented: "... it may well be wise and prudent for the parties concerned in future cases (especially of this nature) to apply to the court to appoint an impartial and objective expert (whose views they would agree to abide by) pursuant to O 40 r 1 [of the ROC]".<sup>109</sup> The suggestion here is that if parties would not be happy with the appointment of an assessor, it would be reasonable to expect them to

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99 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 33 r 4(4).

100 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 33 r 4(5); Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 10A(4); State Courts Act (Cap 321, 2007 Rev Ed) s 33(4).

101 See O 33 r 4(6) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

102 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 33 r 4(6). There are additional provisions governing remuneration. See O 33 r 4(7)–O 33 r 4(9) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

103 See O 70 r 25(2), O 70 r 26(2) and O 70 r 28 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

104 For a case in which the court ruled against the involvement of an assessor in the hearing of an application to strike out under O 18 r 19, see the decision of the Singapore High Court in *Aztech Systems Pte Ltd v Creative Technology Ltd* [1995] 3 SLR(R) 568. However, an assessor was appointed for the purpose of the trial. For a useful account of the role of assessors at trial, see *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 at 222–223. For cases on assessors, see *Singapore Court Practice 2014* (J Pinsler gen ed) (LexisNexis, 2014) at para 33/4 and *Singapore Civil Procedure 2015* (G P Selvam gen ed) (Sweet and Maxwell, 2015) at para 33/4.

105 Because he is not a witness. See para 17 above.

106 The assessor is still recognised in many jurisdictions. For the position in England, see r 35.15 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) and para 10 of Practice Direction 35.

107 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724.

108 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [45].

109 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [45].

accept the appointment of a court expert.<sup>110</sup> It is submitted that assessors continue to have an important role, albeit in exceptional cases; as when the judge requires personal advice from a specialist in order to resolve complex matters, or to unravel difficult issues which have been obfuscated by the parties' experts.

#### IV. Proposals for reform

##### A. *Fundamental issues*

19 It was mentioned earlier that the legal infrastructure for expert evidence requires further development to ensure that the interests of the administration of justice are not compromised by untruthfulness, unnecessary expenditure, extravagant use of trial time and the obfuscation of issues.<sup>111</sup> The absence of a provision which enables the court to control the parties' use of expert witnesses at trial means that these concerns cannot be effectively addressed under the rules of procedure as they now stand. For example, the potential value of the expert evidence may not be sufficiently significant to justify the costs or time which would be necessary to present it. The advantages of adducing expert evidence in the adversarial setting may be outweighed by the negative considerations in producing it. Furthermore, as proportionality is now a fundamental principle underlying the recovery of costs,<sup>112</sup> the parties should be particularly concerned about the justification of expert evidence (even if it is admissible).<sup>113</sup> As has been shown, the ROC empower the parties to call their own experts subject only to the power of the court to limit the number of experts.<sup>114</sup> Permission is not needed to present expert evidence and once parties engage their experts, there is an unyielding assumption that they will be called at trial notwithstanding the countervailing factors mentioned in the earlier part of this paragraph.<sup>115</sup> Indeed, parties often appoint their experts early on in the case on the assumption that they are *entitled* to call them as witnesses in court. This assumption is justified by the ROC which do not require the permission of the court for the purpose of calling a single expert witness (although the court has the discretion to limit the number of expert witnesses). This raises the question of effective case management pursuant to appropriate rules of court.

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110 For the practice concerning court experts, see paras 13–16 above. The proposed expansion of the court expert's role is considered in paras 40–44 below.

111 See paras 2–9 above.

112 See O 59, Appendix 1, para 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Also see paras 20, 28, 29 and 45 below.

113 See paras 20–28 and 45 below.

114 See paras 11–12 above.

115 See paras 11–12 above.

20 Fundamentally, a thorough evaluative process is necessary prior to trial (whether on the summons for directions or in the course of a case-management or pre-trial conference), which would enable the court to fully consider whether expert testimony is justified and, if so, the form it should take. The ROC ought to be modified so that an expert witness may only be called with the permission of the court. If permission to adduce expert testimony is granted, the court should have a menu of options concerning the type of expert who may be called including an expert jointly instructed by the parties (“parties’ joint expert”), the traditional party expert (“party’s own expert”) or a court expert or, in exceptional circumstances, a combination of such experts. The evaluative process would take into account such matters as the nature of the case, the suitability and potential significance of the proposed expert testimony, the costs of procuring it, the resources of the parties and the court, whether the significance of the expert evidence would outweigh countervailing factors in producing it, whether the principle of proportionality would be satisfied if the parties call their own experts, whether the involvement of a jointly-instructed expert, court expert or party expert (or a combination of one or more of such experts) would be advantageous, and whether a particular expert would be counter-productive or inappropriate given the area of expertise required or his relationship to either party or his potential interest in the outcome of the case. It is submitted that *the judge who is to preside at the trial* should manage the conference as he or she would be ideally placed to decide on the evidence which is to be presented.

21 Arguments might be raised against the proposal to empower the court to prohibit the use of experts at trial. First, it may be contended that as s 47 of the EA sets the scope of admissibility, any attempt by the ROC to preclude an expert from testifying, even though his evidence may assist the court pursuant to s 47(1) of the EA, would be *ultra vires*.<sup>116</sup> The response to this argument lies in the Explanation to s 5 of the EA, which states: “This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to civil procedure.”<sup>117</sup> The operation of this provision is demonstrated by Illus (b) to s 5, which states:<sup>118</sup>

A, a party to a suit, does not comply with a notice given by B, the other party, to produce for B’s inspection a document referred to in A’s pleadings. This section does not enable A to put such document in evidence on his behalf in such suit, otherwise than in accordance with the conditions prescribed by the Rules of Court ...

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116 The point being that subsidiary legislation may not circumscribe a statute.

117 See Illus (b) to s 5 of the Evidence Act (Cap 97, 1997 Rev Ed).

118 Also see Illus (a) to s 5 of the Evidence Act (Cap 97, 1997 Rev Ed).

The Explanation to s 5 clarifies that evidence is not automatically admissible under s 6 to s 57 of the EA. Admissibility is subject to compliance with procedural rules which relate to the evidence concerned (as in the case of Illus (b) to s 5). It follows that a rule of court which empowers the court to disallow expert evidence altogether, or to admit the report of an expert jointly instructed by the parties, or to appoint a court expert, or to make any other order permitted by the rules, would be entirely legitimate.

22 The second objection which might be made is that the introduction of the court's power to disallow expert evidence would strike at the heart of the adversarial system of litigation, which is premised on the freedom of the parties to call witnesses of their choosing. The first point to be made in response to this argument is that while the adversarial prerogative is generally true of witnesses of fact,<sup>119</sup> it does not extend with the same rigour to expert witnesses. As expert evidence is only admissible if it assists the court, and the expert's duty is to assist the court on the matters within his expertise,<sup>120</sup> and this duty overrides any obligation to the party who instructs him,<sup>121</sup> the court must be in a position to deny the admission of expert evidence if it would not be in the interests of justice to hear it. Secondly, the point was made earlier that for centuries expert evidence was a matter for the court to decide upon to enable it to adjudicate the case properly. Party experts emerged much later as a result of litigation trends in the 19th century.<sup>122</sup> We now live in an era of new and unprecedented concerns such as mass litigation which depletes the court's resources (thereby impairing access to justice), escalating costs, and the proliferation of new areas of specialist knowledge (which require the parties to rely on expert evidence), as well as the associated problems of partisanship and untruthfulness. A party's mere assertion that he is "entitled" to call expert evidence is a hollow echo of the 19th century view in the face of the modern realities of litigation. Yet, this is currently the position under the EA and the ROC. Sections 47(1) and 47(3) of the EA admit expert evidence simply on the basis that it may assist the court even if it concerns a matter of "common knowledge".<sup>123</sup> As the degree of assistance is not specified, it is quite possible for a party to claim entitlement to adduce expert testimony notwithstanding that the extent to which it would assist the court would be minimal compared to its adverse consequences (such as disproportionate costs, the additional

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119 In *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 at [25], V K Rajah JA emphasised the right of a party (subject to the rules of evidence and procedure) to call witnesses of fact to prove his case.

120 See O 40A r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

121 See O 40A r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

122 See para 13 above.

123 See para 6 above.

time which would be necessary to adduce it and any negative impact it may have in complicating the issues or distracting the court).<sup>124</sup>

23 Quite apart from the question admissibility under s 47 of the EA, it is necessary for the court to apply a balancing test to determine if the potential degree of assistance which the expert evidence would offer justifies the adverse consequences of adducing such testimony. Such an approach would be consistent with s 47(4) of the EA, which empowers a judge to exclude admissible expert evidence in the course of a trial on the ground that it would not be in the interests of justice to hear it.<sup>125</sup> The judge would base his decision on the circumstances of the case. However, as s 47(4) is an evidential rather procedural provision, it would be necessary to introduce rules which provide the judicial officer or judge in charge of case management with the discretion to determine whether the basic threshold conditions for expert evidence have been complied with prior to the commencement of the trial. If not, the application to call an expert would be denied. If the conditions are satisfied, the trial court may still exclude the expert evidence at trial pursuant to s 47(4) of the EA if, in the face of all the other evidence adduced or sought to be adduced, it would not be in the interests of justice to admit it. In the absence of a procedural control mechanism to monitor the justification of expert evidence before trial, the parties are likely to incur unnecessary costs and waste additional time in preparing experts only to see them being rejected by the trial court.

24 The State Courts Practice Directions do provide for a process entitled “Early Expert Pre-trial Conference” (“EEPC”).<sup>126</sup> The EEPC may be requested in writing by a party at any time after the entry of appearance<sup>127</sup> or directed by the court at any time prior to trial.<sup>128</sup> However, these practice directions do not expressly provide that the court’s permission is necessary for the adduction of expert evidence. Although the court has the power under O 34A to make and give directions for the just, expeditious and economical disposal of proceedings, the assumption in the guidelines set out in para 5 of Appendix J of the State Courts Practice Directions is that the court is primarily concerned with the management of expert evidence. Therefore the orders which may be made at the EEPC include “extensions of time to file and serve pleadings, the appointment of a

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124 See paras 2–8 and 19 above.

125 See para 10 above.

126 See para 152 of the State Courts Practice Directions, which is expressed to be made pursuant to O 34A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (State Courts Practice Directions para 152(1)).

127 See para 152(1)(a) of the State Courts Practice Directions. Form 57 of Appendix B is to be used for the letter of request. Also see para 3 of Appendix J of the State Courts Practice Directions, concerning the timeline for the hearing date.

128 See para 152(1)(d) of the State Courts Practice Directions.

single joint expert, the appointment of a limited number of experts for each party and such other orders necessary for the effective management of expert issues". Arguably, there is no legal basis for these practice directions to empower the court to prohibit expert evidence altogether because, as pointed out earlier, the ROC impose no such restriction (except for the power to limit the number of expert witnesses).<sup>129</sup> The reference to a "single joint expert" is simply an option for the court, which is not commonly exercised in the face of the resistance by the parties. The potential value of an expert jointly instructed by the parties will be considered in the following section.

## **B. *Parties' joint expert***

### *(1) Rationale for introduction of parties' joint expert*

25 Where an independent expert may be sufficient to clarify the issues without too much controversy, the engagement of experts by the opposing parties may be purposeless and even counter-productive given the likelihood of conflicting expert testimony with all its attendant problems and disadvantages. And where there is unlikely to be a significant difference of opinion (because the area of specialist knowledge is well established and the facts are reasonably clear), the appointment of an independent expert may present a more favourable outcome in terms of expenditure, time usage and the avoidance of biased testimony. In certain cases, an independent expert may also be the appropriate choice where the circumstances of the case generate a range of possible opinions. This is because the parties may be willing to submit to the expert's conclusions (particularly if he or she is uniquely qualified in the matter) rather than face the impact of multiple expert testimony on their resources and the uncertainty resulting from conflicting views. The appointment of a joint expert by the parties through mutual consensus may also have the effect of redressing the imbalance between the parties with regard to their resources. It is not uncommon for the more financially-established party to take advantage of his position by appointing the very best experts and conducting the case on expert evidence in a manner which overwhelms his less favourably-endowed or resourceful opponent. It is also unacceptable that the unsuccessful party should have to bear the excessive and disproportionate costs of the successful party in engaging his experts.<sup>130</sup> Apart from levelling the playing field, a jointly-instructed expert would ordinarily mean less expense for the parties involved, avoid the risk of biased testimony, uphold the adjudicative role of the court, minimise

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129 See paras 12 and 19–23 above.

130 See *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2011] 1 SLR 582.

delay and enhance the possibility of settlement (because of the absence of conflicting expert testimony).

26 In the proposed scheme, the independent expert would either be agreed to by the parties or, failing agreement, selected by the court from lists of individuals presented by the parties. Such an expert may be referred to as a “parties’ joint expert”. The concept of such an expert has been introduced in other jurisdictions, including England and New South Wales, Australia. In the English CPR,<sup>131</sup> he is referred to as a “single joint expert”,<sup>132</sup> while the nomenclature used in the New South Wales Uniform Civil Procedure Rules (Amendment No 12) 2006 (“UCPR”) is a “parties’ single expert”. The terminology “parties’ joint expert” is preferred over the expressions in the English and New South Wales Rules because the word “single” is unnecessary (given the singular connotation of “expert”) and the words “parties” and “joint” emphasise that the expert is instructed by both or more of the parties. The primary role of this independent expert is to prepare a comprehensive and objective report pursuant to the instructions of the parties for the court to consider.<sup>133</sup>

(2) *Manner of appointment of joint expert*

27 If the parties agree on the person who is to be their joint expert and the latter is qualified to be an expert in the view of the court, it may give effect to the parties’ agreement. If the parties are unable to agree on an expert or their proposed expert is not acceptable to the court, the court may appoint the expert from lists of experts which the parties would be invited to submit for the court’s consideration. The English Civil Justice Council’s 2014 *Guidance for the instruction of experts in civil claims*<sup>134</sup> (“Civil Justice Council’s Guidance Note”) encourages the use of joint experts and provides that “[w]herever possible a joint report should be obtained”.<sup>135</sup> It also urges the parties to jointly instruct an expert as early as possible so that all necessary investigations and assessments can be conducted before the matter between them becomes

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131 Cited at para 11 above.

132 A “single joint expert” is defined as “an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the claimant) to the proceedings” (see r 35.2(2) of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK)).

133 Rule 35.2(2) of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) defines a single joint expert as “an expert instructed to prepare a report for the court on behalf of the parties (including the claimant) to the proceedings”. The Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) does not contain an express definition but provides that a “parties’ single expert” means an expert engaged pursuant to r 31.37 (see para 30 below).

134 Published in August 2014.

135 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 34.

contentious.<sup>136</sup> At the very least, the early appointment of a joint expert could have the effect of limiting the potential issues earlier (rather later) in dispute. The Civil Justice Council's Guidance Note goes on to state that if a party has already been advised by an expert in the current or a previous case, he should only be proposed as a single joint expert if the other parties are provided with all relevant information concerning his previous involvement.<sup>137</sup> It also clarifies that the appointment of a single joint expert does not prevent the parties from instructing their own experts to advise (although the costs of their own experts would not be recoverable).<sup>138</sup> If the parties are unable to agree on who should be the single joint expert, the court may: "(a) select the expert from a list prepared or identified by the relevant parties; or (b) direct that the expert be selected in such other manner as the court may direct."<sup>139</sup>

28 It is proposed that the ROC provide for the appointment of a parties' joint expert as a matter of general practice subject to the court's discretion to permit the parties to appoint their own experts in an appropriate case.<sup>140</sup> Such an approach would temper the parties' assumption that they are entitled to call their own experts. It would also limit the consequences of the traditional, adversarial mould of expert testimony<sup>141</sup> by requiring the parties to show clearly why they should be permitted to call their own experts. Under the CPR, when two or more parties wish to submit expert evidence on a particular issue, the court may direct that evidence be given by a "single joint expert".<sup>142</sup> In exercising its discretion, the court is to take into account all the circumstances of the case, particularly whether it should give permission for the parties to rely on expert evidence and whether a single joint expert may be engaged. Considerations include whether:<sup>143</sup>

- (a) it is proportionate to have separate experts for each party on a particular issue with reference to:
  - (i) the amount in dispute;
  - (ii) the importance to the parties; and
  - (iii) the complexity of the issue;

136 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 35. Costs would also be saved by the parties' collaboration in investigation.

137 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 36.

138 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 37.

139 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.7(2).

140 See paras 29–32 below.

141 As mentioned in paras 3 and 19 above.

142 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.7(1).

143 See para 7 of Practice Direction 35 which supplements r 35.7 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK).

- (b) the instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts;
- (c) expert evidence is to be given on the issue of liability, causation or quantum;
- (d) the expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute or there is likely to be a range of expert opinion;
- (e) a party has already instructed an expert on the issue in question and whether or not that was done in compliance with any practice direction or relevant pre-action protocol;
- (f) questions put in accordance with rule 35.6 are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert;
- (g) questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial;
- (h) a conference may be required with the legal representatives, experts and other witnesses which may make instruction of a single joint expert impractical; and
- (i) a claim to privilege makes the instruction of any expert as a single joint expert inappropriate.

As for the UCPR,<sup>144</sup> the rules empower the court to give any directions it considers appropriate concerning expert evidence including the appointment of a party's single expert on a specified issue and/or the appointment and instruction of a court-appointed expert in relation to a certain matter.<sup>145</sup> Although the UCPR do not have an express permission rule, the court effectively controls expert testimony by giving the appropriate directions.<sup>146</sup>

### (3) *Permission of the court and its directions*

29 If the court is to exercise proper control over its own process by regulating the circumstances in which expert evidence is to be given, it must have the power to permit or deny the parties' request to adduce such testimony in accordance with expressly-formulated criteria. Rule 35.4(1) of the CPR expresses the rule as follows: "No party may call an expert or put in evidence an expert's report without the court's permission." A party who applies for permission must provide an

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144 The Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) are introduced in para 26 above.

145 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) rr 31.20(2)(f) and 31.20(2)(g).

146 See paras 29–32 (particularly para 32) below.

estimate of the costs of the proposed expert evidence and identify: “(a) the field in which expert evidence is required and the issues which the expert evidence will address; and (b) where practicable, the name of the proposed expert.”<sup>147</sup> If the court grants permission, the order would be limited to an expert in the field with which the court is concerned and may specify the issue(s) which the expert evidence should address.<sup>148</sup> The court is also entitled to “limit the amount of a party’s expert’s fees and expenses that may be recovered from any other party.”<sup>149</sup> The estimate of the costs of producing expert evidence would certainly assist the court in deciding whether they *prima facie* satisfy the principle of proportionality. Information concerning the area of knowledge in the case and the issues with which the expert will be concerned are also necessary in enabling the court to reach a proper conclusion on whether expert evidence ought to be permitted, the type of expert(s) which is/are appropriate and the form which expert evidence should take.

30 With regard to the parties’ single expert under the UCPR, it is provided that, “If an issue for an expert arises in any proceedings, the court may, at any stage of the proceedings, order that an expert be engaged jointly by the parties affected.”<sup>150</sup> Apart from the normal situation in which the parties may seek the appointment of a single expert, this rule literally extends to the situation in which the court may, on its own initiative, require that an expert be engaged in relation to a particular issue. If the parties do not co-operate, the court may appoint the expert.<sup>151</sup> Ancillary rules are necessary to ensure the integrity of the process. Therefore, the person engaged as a single expert must consent to the engagement.<sup>152</sup> Furthermore, if a party in the suit knows a person who is under consideration for engagement as a single expert, he must not, prior to the engagement, communicate with the person for the purpose of eliciting the person’s opinion as to the issue or issues concerned. If he has previously communicated with the person for that purpose, he must notify the other parties affected as to the substance of those communications.<sup>153</sup>

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147 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.4(2).

148 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.4(3). Also see r 35.4(3A), which states: “Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.”

149 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.4(4).

150 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.37(1).

151 Rule 31.37(2) of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) states: “A parties’ single expert is to be selected by agreement between the parties affected or, failing agreement, by, or in accordance with the directions of, the court.”

152 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.37(3).

153 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.37(4).

31 Unlike the CPR, the UCPR do not require the parties to obtain the express permission of the court for the purpose of presenting expert evidence. However, the UCPR do provide that expert evidence is not permitted otherwise than in accordance with the court's directions.<sup>154</sup> A party who may, or intends to, adduce expert evidence at trial is required to seek directions, which may be sought at a directions hearing or case management conference or (in the absence of such a hearing or conference), by application. Unless the court directs otherwise, expert evidence may not be adduced unless directions have been given to this effect and they have been complied with.<sup>155</sup> The court's control is underlined by r 31.44 of the UCPR (entitled "Prohibition of other expert evidence"), which states: "Except by leave of the court, a party to proceedings may not adduce evidence of any other expert on any issue arising in proceedings if a parties' single expert has been engaged under this Division in relation to that issue." In certain circumstances (particularly if the case is complex and/or involves multiple issues), it may be necessary for a parties' joint expert and the parties' own experts to be appointed in conjunction.

32 Under the UCPR, the court may give whatever directions it considers appropriate<sup>156</sup> including:<sup>157</sup>

- (a) a direction as to the time for service of experts' reports;
- (b) a direction that expert evidence may not be adduced on a specified issue;
- (c) a direction that expert evidence may not be adduced on a specified issue except by leave of the court;
- (d) a direction that expert evidence may be adduced on specified issues only;
- (e) a direction limiting the number of expert witnesses who may be called to give evidence on a specified issue;
- (f) a direction providing for the engagement and instruction of a *parties' single expert* in relation to a specified issue;
- (g) a direction providing for the appointment and instruction of a *court-appointed expert* in relation to a specified issue;
- (h) a direction requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue;

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154 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) rr 31.19(1)–31.19(3).

155 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.19(3).

156 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.20(1).

157 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.20(2).

- (i) any other direction that may assist an expert in the exercise of the expert's functions;
- (j) a direction that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.

Under the CPR, the court has a broad discretion to give directions as well, even to the extent of requiring a party to provide information which is "not reasonably available to another party".<sup>158</sup>

#### (4) *Instructions*

33 Under the CPR, if a single joint expert is appointed pursuant to the direction of the court, any party may give instructions to him or her.<sup>159</sup> Certain procedures apply in these circumstances. First, a party who gives instructions to the expert is required to send a copy of those instructions to every other party in the suit.<sup>160</sup> The court may give directions concerning: (a) the payment of the expert's fees and expenses and (b) any inspection, examination or experiments which the expert wishes to carry out.<sup>161</sup> Prior to the time that the expert is instructed, the court may (a) limit the amount that can be paid by way of fees and expenses to the expert and (b) direct that some or all of the relevant parties pay that amount into court.<sup>162</sup> If the court does not give contrary directions, the parties are jointly and severally liable for the payment of the expert's fees and expenses.<sup>163</sup> The following guidelines concerning instructions to an expert who is jointly engaged by the parties are set out in the Civil Justice Council's Guidance Note.<sup>164</sup> The parties are advised to agree to joint instructions to the joint expert. Separate instructions may be given if they are unable to reach a consensus.<sup>165</sup> Here, they "should try to agree where the areas of disagreement lie and their instructions should make this clear. If separate instructions are given, they should be copied to the other instructing parties".<sup>166</sup> The terms of appointment of a jointly-instructed expert should (unless the court makes a different

158 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.9. The party may be ordered to prepare, file and serve copies of the relevant documents. Also see para 4 of Practice Direction 35.

159 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.8(1).

160 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.8(2).

161 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.8(3).

162 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.8(4).

163 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.8(5).

164 See para 27 above.

165 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 38. This paragraph further states: "In particular, all parties should try to agree what documents should be included with instructions and what assumptions single joint experts should make."

166 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 39.

order or the parties have reached a different agreement) include a statement that all the instructing parties are jointly and severally liable to pay the expert's fees and, accordingly, that expert's invoices should be sent simultaneously to all instructing parties or their solicitors (as appropriate). If an order has been made limiting the expert's fees and expenses, a copy of the order must be factored into the appointment.<sup>167</sup> Difficulties may arise if the joint expert has not received instructions from one or more of the instructing parties, in which case he should give reasonable notice of a deadline for their receipt.<sup>168</sup>

34 Regarding the UCPR, the parties are expected to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based.<sup>169</sup> If the parties are unable to agree, they are required to obtain directions from the court.<sup>170</sup> The parties' single expert may seek directions (by written request) for the court to assist him in performing his functions.<sup>171</sup> Similarly, under the CPR, the single joint expert may ask the court for directions.<sup>172</sup>

#### (5) *Reports, questions and clarification*

35 As in the case of instructions given to a joint expert,<sup>173</sup> it would be necessary to develop distinct rules to govern the reports, questions and clarification concerning his evidence. Some of the provisions concerning the reports or ordinary party experts and the questions which may be put to them in O 40A r 3 and O 40A r 4 of the ROC respectively may be germane, although the critical difference between a

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167 United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) at para 40.

168 See para 41 of United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014), which goes on to provide:

Unless the instructions are received within the deadline the expert may begin work. If instructions are received after the deadline but before the completion of the report the expert should consider whether it is practicable to comply without adversely affecting the timetable for delivery of the report and without greatly increasing the costs and exceeding any court approved budget. An expert who decides to issue a report without taking into account instructions received after the deadline must inform the parties, who may apply to the court for directions. In either event the report must show clearly that the expert did not receive instructions within the deadline, or, as the case may be, at all.

169 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.38(1).

170 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.38(2).

171 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) rr 31.39(1) and 31.39(2). The expert must send a copy of the request to the parties affected (r 31.39(3)).

172 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.14.

173 See the preceding paragraph.

party expert and a joint expert is that the latter is receiving input from two or more parties. The CPR does not distinguish between the party expert and single joint expert as far as the report and related matters are concerned. The only provisions which are specifically concerned with a single joint expert are r 35.7 of the CPR (court's power to direct that evidence is to be given by a single joint expert), r 35.8 of the CPR (instructions to a single joint expert), and para 7 of Practice Direction 35 (which sets out the criteria for granting permission for parties to rely on a single joint expert). The rules governing other procedures relating to expert evidence (including reports, questions and clarification) do not distinguish between party experts and joint experts.<sup>174</sup>

36 In contradistinction, the UCPR provide detailed procedures concerning the joint expert's report. For example, the parties' single expert must send a signed copy of his or her report to each of the parties affected. Each copy must be sent on the same day and must be endorsed with the date on which it is sent.<sup>175</sup> Clarification of any aspect of the report may be sought by notice in writing by any of the affected parties. The notice (which has to be endorsed with the date on which it is given)<sup>176</sup> must take the form of questions up to ten in number, unless the court gives leave for variation.<sup>177</sup> This right arises within a period of 14 days after the report is sent to the parties and before it is put into evidence.<sup>178</sup> The parties are entitled to give a single notice. If further notices necessary, leave must be obtained.<sup>179</sup> The party giving notice must, on the same day as it is sent to the parties' single expert, send a copy of that notice to each of the other parties.<sup>180</sup> The parties' single expert must respond to the notice (by sending copies of the response to the parties) within a period of 28 days after the notice was given to him.<sup>181</sup> Provision is also made for the tender of the expert's report and his answers to questions to be tendered in evidence,<sup>182</sup> and for his cross-examination in court.<sup>183</sup>

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174 Also see paras 48–61 of the United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) (see para 27 above).

175 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) rr 31.40(1) and 31.40(2).

176 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.41(5).

177 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.41(3).

178 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.41(1).

179 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.41(2).

180 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.41(4).

181 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.41(6).

182 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.42.

183 Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) r 31.43.

(6) *Conduct of joint expert*

37 As in the case of a party's expert, the joint expert must comply with the duties to give impartial and truthful evidence and to comply with the rules and directions concerning the scope, content and form of this testimony. Therefore, the relevant provisions in O 40A of the ROC could apply subject to any adaptations which may be necessary as a result of his joint appointment. Pursuant to his duty "to assist the court on matters within his expertise",<sup>184</sup> which overrides "any obligation to the person[s]<sup>185</sup> from whom he has received instructions or by whom he is paid",<sup>186</sup> the party expert must (subject to the court's contrary direction) give his evidence "in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report".<sup>187</sup> The report itself must:

- (a) give details of the expert's qualifications;
- (b) give details of any literature or other material which the expert witness has relied on in making the report;
- (c) contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given;
- (d) if applicable, state the name and qualifications of the person who carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision;
- (e) where there is a range of opinion on the matters dealt with in the report:
  - (i) summarise the range of opinion; and
  - (ii) give reasons for his opinion;
- (f) contain a summary of the conclusions reached;
- (g) contain a statement of belief of correctness of the expert's opinion; and
- (h) contain a statement that the expert understands that in giving his report, his duty is to the Court and that he complies with that duty.

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184 See O 40A r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

185 The persons denote the parties who have jointly instructed him.

186 See O 40A r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

187 See O 40A r 3(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The joint expert's report is discussed in the preceding two paragraphs.

38 The fundamental difference between the joint expert and a party's own expert is that the joint expert has the same (equal) responsibilities to each of the parties who have instructed him. Therefore, the importance of independence and impartiality as between the instructing parties is paramount. Absolute transparency is critical to the role of the joint expert. This means that instructions given by one party must be disclosed by that party to the other party.<sup>188</sup> If the expert is aware that this procedure has not been complied with, he should seek directions from the court before taking any further steps in the case.<sup>189</sup> When communicating, the joint expert should ensure that his correspondence is sent to all the instructing parties.<sup>190</sup> Similarly, meetings and discussions must not take place in the absence of an instructing party unless he has expressly consented to the expert meeting the other party or parties.<sup>191</sup> As for the expert's report, this should be communicated to all the instructing parties at the same time so that no advantage is gained by one over the other (whether apparent or actual). The situation may well arise where the instructing parties do not agree on the facts or make contrary allegations in their instructions to the joint expert. In these circumstances, the joint expert may have to provide different opinions on the basis of facts or allegations made by the parties. It would be for the court to determine for itself what facts are established, if this is possible.<sup>192</sup>

(7) *Remuneration of joint expert*

39 As a matter of principle, it should be for the parties who have instructed the joint expert, and who would potentially benefit from his testimony, to remunerate him. Ideally, the parties should agree to his fees. However, if they are unable to reach a consensus, the court would be entitled to intervene and give directions. The CPR take a more inquisitorial approach than the UCPR towards the remuneration of the joint expert. The CPR provide that the court may give directions about the payment of the joint expert's fees and expenses, limit the amount of such fees and expenses, direct that some or all of the relevant parties pay that amount into court and, unless the court otherwise directs, makes

188 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 35.8(2). See paras 33–34 above.

189 Unless the other party brings the matter to the attention of the court.

190 See, for example, para 42 of the United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) (introduced in para 27 above).

191 See, for example, para 44 of the United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) (introduced in para 27 above).

192 See, for example, para 46 of the United Kingdom, Civil Justice Council, *Guidance for the instruction of experts in civil claims* (August 2014) (introduced in para 27 above).

the parties jointly and severally liable for the payment of those fees and expenses.<sup>193</sup> Under the UCPR, the court is only involved in the matter of the joint expert's remuneration if the parties are unable to agree on the amount payable. The joint and several liability of the involved parties is automatic subject to the court's discretion to make specific directions concerning the timing of payments and the party who should make them.<sup>194</sup> It is also provided that the rules governing the liability of the parties to pay the joint expert do not affect the powers of the court concerning costs.<sup>195</sup> Interestingly, the same rules apply to a court expert under the UCPR.<sup>196</sup> The Singapore position under O 40 r 5 of the ROC is that the remuneration of a court expert is fixed by the court<sup>197</sup> and the parties, who are jointly and severally liable for the amount payable,<sup>198</sup> have no say in the matter. If the concept of an independent joint expert is introduced to the ROC, it would be appropriate to remove the right of a party to apply for the appointment of a court expert (which is currently expressed in O 40 r 1(1) of the ROC) so that such an appointment is entirely a matter for the court. In such circumstances, it would be desirable for the court to continue to determine the remuneration of the court expert without the input of the parties, who would remain jointly and severally liable for the amount due subject to the directions of the court. The role of the court expert is considered in the following paragraphs.

### C. Court expert

40 It has been seen that the court may appoint its own expert on a matter requiring the evidence of such a witness.<sup>199</sup> In the proposed scheme, the court expert would have an enhanced role. In current practice, a court expert is appointed in very exceptional circumstances.<sup>200</sup>

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193 See rr 35.8(3)(a), 35.8(4)(a), 35.8(4)(b) and 35.8(5) of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK), respectively.

194 See paras 31.45(1)–31.45(3) of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

195 See para 31.45(4) of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

196 See para 31.53 of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

197 See O 40 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

198 See O 40 r 5(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

199 See paras 13–16 above.

200 For example, see *Riduan bin Yusof v Khng Thian Huat* [2005] 2 SLR(R) 188 at [8] and *Khng Thian Huat v Riduan bin Yusof* [2005] 1 SLR(R) 130 at [9] (in which the parties agreed to a court expert because of the substantial disparity of the evidence of their respective experts); *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [48]; *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178; *Hwang Cheng Tsu Hsu v Oversea-Chinese Banking Corp Ltd* [2010] 4 SLR 47; *Tan Seok May Joanne v Yau Hok Man Gordon* [2013] 2 SLR 18 at [52]; *Yogambikai Nagarajah v Indian Overseas Bank* [1995] SGHC 262 (HC), (cont'd on the next page)

This is so even though the court is empowered to appoint an independent expert on its own initiative or on the application of a party to investigate and provide his opinion on any matter.<sup>201</sup> It may be said that where expert testimony is necessary, it almost invariably takes the form of the parties' own experts. Interestingly, the CPR did not retain the former O 40 of the Rules of the Supreme Court, which governed the appointment and functions of court experts.<sup>202</sup> The reason for this omission might have been rooted in the view that the introduction of the "single joint expert" would render the court expert redundant. However, while the joint expert may overlap with the court expert in the sense that they are independent and non-partisan, and that they are appointed through the court process rather than being separately engaged by the parties, there are essential distinctions between their respective roles. The joint expert is the parties' witness because it is they who instruct him and it is to them that he provides his report. They may ask him questions and seek clarification from him. The court is not involved in this process except to the extent that the parties can't agree on the expert to be chosen or further directions from the court are necessary for any reason.

41 While the evidence of the joint expert is provided primarily in response to the parties' instructions, the court expert is the "court's witness" in the sense that his opinion and information is specifically sought by the court to assist it determining a matter or issue in the case. Therefore, the court has complete control over the matter and an unfettered discretion to appoint its own expert on its own initiative or on the application of a party. Order 40 r 1(1) of the ROC states:

In any cause or matter in which any question for an expert witness arises, the Court may at any time, on its own motion or on the application of any party, appoint an independent expert or, if more than one such question arises, 2 or more such experts, to inquire and report upon any question of fact or opinion not involving questions of law or of construction.

The provision for the application by a party for the appointment of a court expert was the only route available to the appointment of an independent witness. Although the courts have long encouraged parties to engage the court expert through O 40 r 1 in order to avoid adversarial bias, higher costs and the additional time needed for trial, the invitation has rarely been taken up. And the fact that the Singapore courts have only exceptionally appointed their own experts is not indicative of their

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[1996] 2 SLR(R) 774 (CA) at [25]; *Teo Geok Fong v Lim Eng Hock* [1999] SGHC 209 at [6].

201 See O 40 r 1(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

202 The former O 40 of the Rules of the Supreme Court was in essentially the same terms as the current O 40 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

lack of utility but of the dominance of the parties' own experts in civil litigation and the apparent aversion to independent experts.<sup>203</sup>

42 If the concept of the joint expert is introduced in the interest of impartiality, practicality and economy, it may no longer be necessary for a party to apply for the appointment of a court expert. It would be a matter for the court to decide whether it requires its own expert (quite apart from the parties' needs) because there is a matter or issue concerning which expert assistance is necessary.<sup>204</sup> In the proposed setting, the procedures governing the court expert and the parties' joint expert would be entirely distinct. Order 40 would need to be amended to emphasise the autonomy of the court in appointing its own experts. Rule 1(1) of O 40 is set out in the preceding paragraph. The reference to an application by the party would be removed and replaced by a broad discretionary provision, which might be modelled on r 31.46(1) of the UCPR:

If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:

- (a) appoint an expert to inquire into and report on the issue, and
- (b) authorise the expert to inquire into and report on any facts relevant to the inquiry, and
- (c) direct the expert to make a further or supplemental report or inquiry and report, and
- (d) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions concerning the giving of such instructions.

Although the parties would not be entitled to make an application for the appointment of a court expert, the court would have the discretion to hear their views on his selection.<sup>205</sup> However, the engagement of the court expert would be entirely a matter for the court.<sup>206</sup>

43 Ancillary rules concerning the individual's consent to act as a court expert, and which address any pre-existing relationship between a party and that individual or subsequent unilateral communications

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203 Note the observations of the Court of Appeal in *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724, which are addressed at paras 8, 9 and 18 above.

204 As when no other expert has been called by the parties or when an additional opinion or further information is necessary to properly determine the matter or issue.

205 On the basis that it is the parties who are directly affected by the litigation.

206 For example, see r 31.46(2) of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

between a party and that individual, would be necessary.<sup>207</sup> It would also be necessary to include provisions governing the instructions of the court to its appointed expert,<sup>208</sup> directions which the expert might seek for the purpose of fulfilling his role,<sup>209</sup> the court expert's report<sup>210</sup> and his examination in court.<sup>211</sup> As it is the parties who have the immediate interests in the litigation, they would have the responsibility to remunerate the court expert according to the court's directions.<sup>212</sup> The current O 40 r 6 would have no place in the proposed scheme. It states:

Where a court expert is appointed in a cause or matter, any party may, on giving to the other parties a reasonable time before the trial notice of his intention to do so, call one expert witness to give evidence on the question reported on by the court expert but no party may call more than one such witness without the leave of the Court, and the Court shall not grant leave unless it considers the circumstances of the case to be exceptional.

44 The first part of this rule, which entitles a party to call his own witness when a court expert has been appointed, characterises the traditional adversarial position that the parties have the *right* to call evidence to challenge an expert appointed by the court. However, while it may be just for a party to call his own witness to rebut or supplement the testimony of a court expert in certain circumstances, such an eventuality must be permitted by the court. Therefore, it is proposed that the requirement of leave in O 40 r 6 should not be limited to a second expert witness. The court's permission would be necessary if a party wishes to call his own expert in addition to the court expert. This more restrictive approach would be consistent with the proposed general rule that parties may not call any expert witness without the permission of the court.<sup>213</sup>

207 For example, see rr 31.46(3) and 31.46(4) of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

208 Consider r 31.47 of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

209 Consider r 31.48 of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

210 Compare O 40 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to rr 31.49 and 31.50 of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

211 Compare O 40 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to r 31.51 of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).

212 Compare O 40 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to r 31.53 of the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW) (which provides that the amount is to be either agreed by the parties or, failing agreement, determined by the court).

213 See paras 19–20 and 28–29 above. This is the position under the Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW), as provided by r 31.52: “Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed under this Division in relation to that issue.”

## V. Concluding observations

45 Bearing in mind the Court of Appeal's observations that judicial statements need to be taken "with the proverbial pinch of salt, especially when one views [them] through the lenses of practical reality",<sup>214</sup> and that "[t]he real and effective solution to the difficulties centring on the alleged bias of experts probably lies in the sphere of the extra-legal",<sup>215</sup> it is necessary to reformulate the rules for the purpose of changing the adversarial mindset towards expert evidence and, in this context, to provide the court with a flexible system of options tailored to the circumstances of each case. The proposals made in this article might be broadly summarised as follows:

- (a) The judge appointed to conduct the trial should meet the parties in advance to consider their requests to adduce expert evidence.<sup>216</sup>
- (b) The judge would have complete discretion in deciding whether to permit the parties to adduce such evidence.<sup>217</sup>
- (c) The judge would consider whether expert evidence is admissible under s 47 of the EA.<sup>218</sup> Legal arguments may be raised for this purpose.
- (d) If the evidence is admissible, the judge would consider whether it ought to be actually admitted as a matter of discretion.<sup>219</sup> As the admission of admissible evidence would depend on compliance with applicable procedural rules,<sup>220</sup> the discretion of the court (as provided by those rules) would be determinative.
- (e) In exercising his discretion, the judge would take into account all the circumstances of the case including the amount of the claim, the costs of adducing expert evidence, improper use of trial time, and the risk that the evidence may prevent the parties from focussing on the real issues in dispute.<sup>221</sup> The parties would have to present to the judge all necessary information (including details of the likely costs which would be incurred by the adduction of expert testimony)<sup>222</sup> so that he

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214 *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [84], commenting on cases cited at [83].

215 *Khoo Bee Keong v Ang Chun Hong* [2005] SGHC 128 at [85].

216 See paras 19–20 above.

217 See paras 19–20 above.

218 See paras 10 and 21 above.

219 See para 20 above.

220 See s 5 of Evidence Act (Cap 97, 1997 Rev Ed) and its Explanation, which are addressed in para 21 above.

221 See paras 2–5 and 19 above.

222 See para 29 above.

can decide the matter properly.<sup>223</sup> Proportionality would be a paramount principle governing the exercise of the court's discretion.<sup>224</sup>

(f) Having taken into account the matters in para (e), the judge would consider a menu of options including the engagement of the parties' respective experts or a joint expert or a court expert or, if the case is particularly complex or requires the assistance of an independent specialist to resolve issues between party experts, an assessor.<sup>225</sup> The court's discretion would extend to permitting a combination of experts to give evidence when such an approach is clearly necessary. If multiple experts are necessary, the court would be entitled to invoke O 40A r 6 of the ROC so that they might testify as a panel. The court would also be mindful of the need to limit expert testimony (the number and/or types of experts) to what is necessary in the interests of justice. The court would also have the option to limit expert evidence to reports where such a route is appropriate (for example, where the evidence is not contentious and the issues can be resolved without cross-examination).<sup>226</sup>

(g) Quite apart from the orders he might make, or directions which he might give, prior to trial, the judge would also be entitled to control the scope of evidence presented at trial. For example, where he has permitted a party to call an expert on a particular matter and it transpires at the trial that the expert's testimony is not in the interests of justice, the judge would be entitled to exclude it as a matter of discretion under s 47(4) of the EA.<sup>227</sup>

46 As is evident from the observations of the Court of Appeal in recent years,<sup>228</sup> the practice governing expert testimony must be significantly improved. A new approach is necessary to ensure a more flexible system of engaging experts, to optimise the value of expert testimony and to control the costs associated with such evidence. It is hoped that these proposals will at least raise the lamp of reform in the interest of litigants and the overall administration of justice.

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223 See paras 20 and 28 above.

224 See paras 19, 20 and 28–29 above.

225 An assessor might be appointed in exceptional circumstances. See paras 17–18 above.

226 In these circumstances, the experts would not be called to trial.

227 See paras 10 and 12 above.

228 See paras 2–9 above.