HELPFUL IN PROPORTION: WHEN IS EXPERT EVIDENCE "*REASONABLY REQUIRED*"?

"This is a case about the facts, isn't it?"

Such a question has doubtless heralded the progress of more than one case towards an order to the effect that *"No expert evidence being necessary, there be no permission to rely upon expert evidence."* Indeed, a simple categorisation of a case along the lines suggested by the question – the instinct to see a case as either an 'expert' case or not – can prove very attractive. Often, everybody will be agreed on the point, but, where that is not so, is this really the preferred approach?

The starting point must be the provision within the Civil Procedure Rules. It is to be found at rule 35.1, headed *"Duty to restrict expert evidence"*, and says, straightforwardly enough (one might initially think) that *"Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings"*.

What does that mean?

A couple of recent High Court decisions on expert evidence suggest that, at least when cases become more complicated, a nuanced approach, routed in the detail of the pleadings and issues might be required.

The first of the two cases, ***British Airways plc v Spencer and ors (present trustees of the Airways pension scheme)***[1] , is a decision of Warren J on appeal from a deputy master's decision not to permit expert evidence. The case involves a challenge to decisions of pension scheme trustees, and is plainly highly complex. It is said by one party to have potential significance extending to hundreds of millions of pounds. The deputy master had seen the case as a 'facts and law' case, and had not permitted British Airways to adduce actuarial expert evidence. British Airways appealed, and Warren J took the opportunity to set out his understanding of the assessment required of the court under rule 35.1.

Warren J summarises his view of the correct approach at [68] in the judgment, but it is expanded upon elsewhere.

In essence, the court starts by considering whether or not the evidence is *necessary* for the resolution of an issue in the claim. If it is – and if that issue is fit to proceed to trial – then the expert evidence will be reasonably required to resolve the proceedings.

If the evidence is not, strictly, necessary, the court will then continue to consider whether it would be helpful. If the evidence would not actually assist the court at all, then that will, of course, be an end to the matter.

[1] [2015] EWHC 2477 (Ch)

The tricky territory is, naturally, the middle ground. If evidence is liable to be helpful but is not necessary – if it is, as Warren J put it ([63]), *"of very marginal relevance with the court being well able to decide the issue without it"* – it is not automatically ruled out under CPR rule 35.1, but nor is it automatically ruled *in*. The court instead has to weigh the factors and determine the proportionate approach. A wide range of factors might be relevant to guide the making of the decision, including, as Warren J put it (at [63]) *"the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date)."* Warren J went on to note that the proportionality of allowing expert evidence on a live issue within proceedings might depend, if not strictly necessary to resolve the particular issue, on the context of that particular issue within the proceedings as a whole. In other words, evidence that is helpful (but not strictly necessary) in relation to a minor issue may not be proportionate in relation to the case as a whole.

Returning to the facts of *British Airways*, this article is not the place for a consideration of the specific issues and areas of potential expert evidence considered by the court. It will suffice to note that they were considered in considerable detail. The result was that Warren J concluded that, in respect of some areas, there should indeed be permission for reliance on expert evidence.

In the second case, the ***RBS Rights Issue litigation***[2] , Hildyard J adopted Warren J's test from *British Airways* along with a similarly focussed approach. Here, the court was required to consider whether or not equity analysis evidence ought to be allowed, alongside what appears to be a slew of other expert evidence, where the required content of a prospectus was in issue. Referring to Warren J's test as set out in the *British Airways* case, Hildyard J determined, on the facts of this case, not *at the time of his decision* to permit equity analysis evidence, although without entirely closing off the question. Of particular interest (and perhaps translatable to other contexts) was the concern expressed that, whilst there might be a recognised body of expertise, an individual expert might nonetheless not be able to answer the *right* question for the specific test in issue before the court (such as a statutory test), or might be able to do so only in unduly subjective terms. The fear in this case was that what a given equity analyst might want would not necessarily reveal statutory requirements, and even a consensus of equity analysts (if there was one) might not reflect the requirements of *investors* (see, e.g., the observations of the judge at [48]-[49] and [54]).

In both of the above cases, the court was quick to recognise that the helpfulness of expert evidence may not be perfectly clear at the case management stage. Warren J (allowing expert evidence) made

[2] [2015] EWHC 3433 (Ch),

reference to the power of a trial judge to control evidence. Hildyard J (not allowing the evidence sought) left open the potential for a renewed application following the receipt of the other, already permitted, expert reports. Plainly, a judge dealing with an application for expert evidence at the case management stage may have to factor in to consideration how *likely* expert evidence is to assist alongside how *strongly* it will assist if it does.

Of course, things may very well be much more straightforward in many cases. Some, particularly those with a relatively narrow range of issues in play, may fairly obviously require – or not require – an expert. However, particularly where the issues within a case are complex or numerous, it might pay for a party or its advisors, if seeking either to obtain, or to avoid or limit, expert evidence, to start by reflecting on some questions in accordance with the sort which the judge might have to ask in due course. For example:

- Is the evidence of an expert said to be necessary, or merely helpful? Why?

- Is there any potential for the evidence to be actively unhelpful? Might it miss the mark (or obscure the mark)?

- How will expert evidence be brought to bear on *the specific issues* within the case, as well as on the case as a whole?

- Is this a case where proportionality favours a restrictive, or a generous approach? Is allowing evidence which *might not* be helpful the safe course, or risking a dangerous detour?

As with so many of the responses given to judges watching a case management conference take far longer than everybody might have hoped, the answer to the question *"This is a case about the facts, isn't it?"* might very well begin *"My Lord, yes, in part…"*

Oliver Mitchell
Guildhall Chambers
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