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EXPERT'S DUTY TO BE TRUTHFUL IN THE LIGHT OF THE RULES OF COURT

New rules concerning expert evidence were introduced in 2000 (by the Rules of Court (Amendment) Rules 2000 (S 613/2000)). This article examines recent cases involving experts and considers whether further reform is necessary in the interest of truthful testimony.

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I. Introduction

1 The law admits the opinion of an expert witness in order to assist the court in reaching a proper conclusion on a matter which requires the application of special skill or knowledge.¹ This is a primary exception to the general rule that opinion evidence is not admissible² – an exception which is justified on the premise that the expert's input is necessary to the fair adjudication of the dispute. Unfortunately, expert testimony has often obfuscated rather than clarified or simplified the issues so as to defeat its objective. In spite of the well-established methods of judicial scrutiny of opinion evidence in the arena of opposing experts,³ and the new O 40A of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("RC") introduced in 2000,⁴ recent cases reveal that this area of law may need further development.

II. Problem of expert partiality

2 The problem of expert partiality towards his party is not a recent phenomenon. In 1843, Lord Campbell lamented that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to

1 As provided in s 47(1) of the Evidence Act (Cap 97, 1997 Rev Ed).

2 Section 47 is one of a group of sections (ss 47–53) in the Evidence Act which constitute exceptions to the exclusionary rule.

3 See Michael Hor, "When Experts Disagree" [2000] SJLS 241 (primarily concerning criminal cases); Pinsler J, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at pp 188–193.

4 See Section IV of the main text below, "Order 40A rules 2 and 3(g) and (h)".

their evidence”.⁵ The same concern was expressed 150 years later by Lord Bingham when he said:⁶

[W]hether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend ... to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.

3 Singapore judges have complained about this lack of objectivity over many years. Winslow J observed in *Ong Chan Tow v R*⁷ that an expert “would naturally tend to give evidence in favour [of the party who appointed him] – otherwise he would not have been called as a witness”. G P Selvam J commented in *The H 156*,⁸ “All too often, experts are extremely tendentious towards the parties by whom they are retained”.⁹

4 Indeed, one of the most intractable problems which may be faced by a court in the course of a case is the extent to which expert testimony is tainted by partiality or bias. The truth of facts can ordinarily be determined by the assessment of the evidence and the application of the principles governing the burden of proof. An opinion is, by its very nature, more elusive because it may only be the subjective inference or interpretation of one person not shared by others. Although many experts do believe in the views which they espouse, the adversarial system encourages polarity of opinions according to the party line. This is not surprising for a party does not appoint an expert at random. The expert is normally chosen because his opinion favours the position of the party. Sometimes considerable effort is put into this task.¹⁰ The consequence of this practice is that the opinions of the selected experts often are not representative of the view(s) held by the majority in his profession. The financial interest in giving expert testimony does little to promote objectivity. It has been said:

Indeed in many respects the incentives for the expert to favour one party contrary to their actual belief are substantial. First, expert witnesses are paid for their evidence. Secondly, they may be retained

5 *The Tracy Peerage Case* (1843) 10 Cl & F 154 at 191. Also see *Lord Arbinger v Ashton* (1873) 17 LR Eq 358 at 374; *Thorne v Worthing Skating Rink Co* (1877) 6 Ch D 415 (referred to in n 10 *infra*).

6 *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] 1 WLR 1534 at 1542.

7 [1963] MLJ 160.

8 [1999] 3 SLR 756.

9 Slight terminological changes have been made to this statement in the interest of proper syntax.

10 In *Thorne v Worthing Skating Rink Co*, *supra* n 5, at 415, Lord Jessel remarked that a party or his lawyer may question numerous people before choosing their experts and that in one case a party “wanted a certain thing done [and] went to 68 people before they found [an expert]”.

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.¹¹

5 In the course of preparation of the case, the “willing” expert is often primed so that he becomes a member of the “party’s team” in a veritable conflict. In these circumstances, the expert may succeed in postulating an opinion in favour of his party which the expert does not himself believe, if he can justify it as a possible view of the facts. He may do this by over-stressing the plausibility of the opinion and downplaying its weakness. Correspondingly, even though he secretly agrees with the opinion of the opposing expert or believes that it has some validity, he may be astute enough to negate it entirely. Put another way, an expert may be able to “hide” the truth behind an opinion if he is partial to the party which called him.¹² While an advocate is entitled to present his client’s case in the best possible light irrespective of his own personal views, this is certainly not the prerogative of the expert.¹³

6 Although the qualifications of an expert have to be clearly established¹⁴ and the courts have developed principles to gauge the soundness of an expert’s opinion (particularly in the context of conflicting expert testimony),¹⁵ these safeguards do not specifically address the attitude of the expert. They do not prevent an expert from putting forward and justifying an opinion which he does not accept and from denigrating an opinion which he might himself put forward if he had been called by the opposing party. Wise as he may be, a judge does not have the training (which, for example, a psychologist or behaviourist might have) for ascertaining subtle untruths in an opinion. The result is that the court is deprived of the fullness of the witness’s expertise and the information so often determinative of the outcome of a case.

11 Tristram Hodgkinson, *Expert Evidence: Law & Practice* (Sweet & Maxwell, 1990) at p 213. This passage is cited in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 at [81].

12 In *Gunapathy Muniandy v Dr James Khoo* [2001] SGHC 165 at [12.11], Selvam J called this “hiding and siding”.

13 Lord Woolf states that “experts sometimes take on the role of partisan advocates instead of neutral fact finders or opinion givers” (*Final Report on Access to Justice* at ch 13, p 137, para 5). Also see *The Ikarian Reefer* [1993] 2 Lloyd’s Rep 68 at 81 (2nd sub-para).

14 Order 40A r 3(2)(a) RC requires these qualifications to be set down in report.

15 See *supra* n 3.

III. Common law principles

7 The principles concerning the impartiality of expert testimony were well established before the introduction of O 40A of the RC. In *Whitehouse v Jordan*,¹⁶ Lord Wilberforce stated:

Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.¹⁷

8 This duty has been examined in a series of cases resulting in the following propositions. He is expected to “provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise” and this includes not assuming the role of an advocate.¹⁸ He is required to “state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion”.¹⁹ He “should make it clear when a particular question or issue falls outside his expertise”.²⁰ If the expert believes that his opinion “is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one”.²¹ Should the expert change his opinion on a matter which is “material” (for example, after having read the opposing expert’s report), “such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court”.²² And where “expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the

16 [1981] 1 WLR 246 at 256.

17 Endorsed most recently by V K Rajah JC in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162 at [82] and by Choo Han Teck J in *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd* [2001] SGHC 91 at [12].

18 *The Ikarian Reefer*, *supra* n 13, at 81 (Cresswell J citing *Polivitte Ltd v Commercial Union Assurance Co plc* [1987] 1 Lloyd’s Rep 379 at 386; also see *Re J* [1990] FCR 193). Also see *Vita Health Laboratories Pte Ltd v Pang Seng Meng*, *supra* n 17, at [82] (passage set out in main text at para 13, *infra* n 34); *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*, *supra* n 17, at [12].

19 *Re J*, *supra* n 18; *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*, *supra* n 17, at [12].

20 *The Ikarian Reefer*, *supra* n 18; *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*, *supra* n 17.

21 *Re J*, *supra* n 18; *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*, *supra* n 17. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652). Also see *The Ikarian Reefer*, *supra* n 18, and *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*, *supra* n 17).

22 *The Ikarian Reefer*, *supra* n 18; *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*, *supra* n 17.

opposite party at the same time as the exchange of reports".²³ In *Bajumi Wahab v Afro-Asia Shipping Company (Pte) Ltd*,²⁴ Choo Han Teck J, having referred to these observations, added:

[I]n discharging his duty, the expert is required to make reasonable appraisal of reasonable factors. Often, he cannot be proved right; and he must thus gain acceptance of his opinion by the depth of his research, the soundness of his analysis and arguments, and the honesty and impartiality in which he presents his views.

IV. Order 40A rules 2 and 3(g) and (h)

9 When O 40A of the RC was introduced in 2000,²⁵ it affirmed and formulated the existing common law principles. Rule 2 states:

(1) It is the duty of an expert to assist the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instruction or by whom he is paid.

Rule 3(2)(g) requires the expert to state in his report that he believes in the correctness of his opinion. Furthermore, pursuant to r 3(2)(h), he must state that he "understands that in giving his report, his duty is to the court and that he complies with that duty". These two paragraphs have a particular significance in respect of the liability of an expert. An expert who gives evidence of an opinion which he does not believe to be correct may be prosecuted for perjury pursuant to s 191 of the Penal Code.²⁶ Paragraph (g) emphasises this duty and para (h) compels the expert to declare his awareness of it.

10 The new rules were first considered in *Gunapathy Muniandy v Dr James Khoo*,²⁷ where Selvam J stated:

The expert must not only be impartial but must also appear to be so. The expert should avoid being the witness of a party with whom he has a special relationship. If that is unavoidable he must disclose the relevant facts. On this point there must be absolute transparency from

23 *Ibid.* Also see *Stanton v Callaghan* [2000] QB 75 at 107–108, where the above observations are affirmed. Also see the Practice Direction issued pursuant to Pt 35 of the English Civil Procedure Rules ("CPR"), which embodies most of these propositions (in paras 1.1–1.6).

24 *Supra* n 17, at [12].

25 By the Rules of Court (Amendment) Rules 2000 (S 613/2000).

26 Cap 224, 1985 Rev Ed. Explanation 2 to s 191 states, *inter alia*, that "a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe". Also see the main text at para 27 below.

27 [2001] SGHC 165 at [12.15] to [12.17].

the expert witness and his legal adviser for they are both officers of the court.

11 With respect to the learned judge, the fact that the expert has a duty to the court does not make him an officer of the court. Nevertheless, the duty is a clear and emphatic one. The assumption in this passage that an expert may give evidence despite the existence of a “special relationship” between him and the party will be analysed in the context of recent English decisions on the point.²⁸

12 The rules were next considered in *Vita Health Laboratories Pte Ltd v Pang Seng Meng*²⁹ (“*Vita Health*”), in which V K Rajah JC said of O 40A r 2(2):

This duty implicitly obliges him to give testimony that may harm or damage the contentions of his instructing party, if the facts warrant this.³⁰

The learned judge emphasised:

It may be said – albeit with some exaggeration – that while an advocate may be as biased as he chooses to be in pressing his client’s cause, an expert cannot adopt such a stance. An advocate is expected to articulate his client’s views and cause without necessarily interposing his own views. An expert, on the other hand, should not evolve into a spokesperson for his client. Any opinions expressed *must* have a genuine foundation.³¹

13 His Honour also considered that Lord Wilberforce’s *dictum* in *Whitehouse v Jordan* (that expert evidence must be independent and seen to be independent, wholly unaffected by other factors in the litigation)³² “neatly dovetails” with O 40A r 2(2).³³

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. That said, it is entirely permissible for him to propound and press home the opinion he seeks to persuade the court to accept. In essence, his advocacy is limited to supporting his independent views and not his client’s cause. This is an important distinction that some experts fail to grasp.³⁴

28 See Section V below, “Relationship between party and expert and the issue of apparent bias”.

29 [2004] 4 SLR 162.

30 *Ibid* at [80].

31 *Id* at [82].

32 *Ibid*. Lord Wilberforce’s exact quote is set out in the main text at para 7 above.

33 [2004] SGHC 158 at [83].

34 *Ibid*. Also note the learned judge’s specific comments regarding accountancy experts at [84] to [86] of the judgment.

14 It is submitted that *Vita Health* engenders a revitalised judicial approach to expert testimony. If practitioners have been taking Lord Wilberforce's *dictum* with "a pinch of salt" in the past (according to the learned judge, some practitioners might have considered the *dictum* to be "too idealistic"),³⁵ this attitude is no longer tenable in the face of the new rules. Indeed, it is inconceivable that a court would permit an expert to give testimony if it is established, even at an interlocutory stage, that he cannot comply with a duty expressly imposed by the rules. Order 34A r 1 of the RC, which concerns pre-trial conferences, empowers a registrar to make any order or give any direction which is "just, expeditious and economical", and he may do so "notwithstanding anything in these rules". It would certainly not be just to permit an expert to give expert testimony which is in direct contravention of the law as set down in the rules. As the expert's evidence should or would not be relied upon by the court in these circumstances, the time taken and expense incurred by his testimony would not be in the interest of expedition and economy respectively. The fundamental principle that it is the right of each party to call any witness he wishes in support of his case is not absolute. A court may curb this right when its exercise would lead to injustice,³⁶ as in the case of an expert who is clearly shown to be unable to comply with his duty to the court.³⁷ Where an expert is revealed to be biased in the course of trial, the judge may reject the evidence altogether or attribute limited weight to it.

V. Relationship between party and expert and the issue of apparent bias

15 It would seem from the *dictum* of Lord Wilberforce in *Whitehouse v Jordan* – the expert's evidence "must be seen to be independent"³⁸ – that apparent bias disqualifies an expert witness from testifying. According to Selvam J in *Gunapathy*, the expert "must not only be impartial but must also appear to be so" and he "should avoid being the witness of a party with whom he has a special relationship". The question, then, is whether an expert who has a particularly close

35 *Ibid.*

36 See *Auto Clean 'N' Shine Services (a firm) v Eastern Publishing Associates Pte Ltd* [1997] 3 SLR 409, in which the Court of Appeal overruled the judge's decision not to permit certain witnesses of the plaintiffs to be called. Although their affidavits of the evidence-in-chief had not been filed within the period directed on the summons for directions, no prejudice or oppression had resulted from these breaches. Therefore, procedural irregularities concerning affidavits of the evidence-in-chief may lead to the exclusion of witnesses if this outcome is necessary to avoid injustice.

37 In *Stevens v Gullis* [2000] 1 All ER 527, an expert was debarred from giving evidence because of his failure to comply with his duty regarding the content of his report. Also see *Storey v Dorset Community NHS Trust* [2000] CLY 304.

38 See *supra* n 17.

relationship with the party, or has a tangible interest in the outcome of the case, should be automatically excluded on the basis of apparent bias. Or should the court, even in these circumstances, proceed to examine whether there is actual bias. Recent English cases, which concern corresponding rules,³⁹ may provide guidance in this respect.

16 In *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3)*,⁴⁰ the issue was whether a Queens' Counsel could give expert testimony on behalf of the defendant barrister in an action against the latter for professional negligence. The expert and defendant had known each other for 28 years, were good friends and worked in the same chambers. In his report, the expert disclosed this relationship and added:⁴¹

I do not believe that this (*ie*, the relationship) will affect my evidence. I certainly accept that it should not do so but it is right that I should say that my personal sympathies are engaged to a greater degree than would probably be normal with an expert witness.

17 Evans-Lombe J ruled that this admission “rendered [the expert’s] evidence unacceptable as the evidence of an expert on the grounds of public policy that justice must be seen to be done as well as done”.⁴² His Honour concluded:⁴³

[W]here it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be. The question is one of fact, namely, the extent and nature of the relationship between the proposed witness and the party.

18 Accordingly, the learned judge equated the expert with a judge in respect of whom apparent bias is a disqualifying factor.⁴⁴ Strangely, although the earlier case of *Field v Leeds City Council*⁴⁵ was cited to the court in *Liverpool Roman Catholic Archdiocesan Trustees Inc*, it was not

39 There are some very slight inconsequential terminological differences. Compare Pt 35.3(1) and (2) of the CPR with O 40A r 2(1), (2) of the RC and Pt 35.10(2)(a) and (b) with O 40A r 3(2)(h) of the RC. Order 40A r 3(2)(g) corresponds to paras 2.3 and 2.4 of the Practice Direction issued pursuant to Pt 35 of the CPR (concerning the “statement of truth”).

40 [2001] 1 WLR 2337.

41 *Ibid* at [11].

42 *Id* at [12].

43 *Id* at [13].

44 This view is criticised by the author in the following paragraph.

45 [2001] CPLR 129.

referred to in the judgment.⁴⁶ In *Field v Leeds City Council*, a case involving claims by the tenants against the defendant landlord (the local authority) for disrepair, the landlord sought to rely on its employee as an expert in the case. Both the district court and the High Court concluded that it was not appropriate for the employee to give expert evidence in these circumstances. Before the Court of Appeal, counsel for the tenants accepted that the fact of employment did not *per se* disqualify the employee from giving expert evidence for the landlord, a concession which the Court of Appeal endorsed. However, the Court of Appeal pointed out that as the expert's report had not been made available to the judge below (so that he was not aware, *inter alia*, of the circumstances of the employment and the extent to which they would affect an objective evaluation on his part), he was not in a position to make a final determination on the suitability of the expert. The Court of Appeal stressed that there is no presumption that an employee can never be an expert. According to Waller LJ, an expert should be permitted to give expert evidence if he has the relevant expertise and "it can be demonstrated that he or she is aware of his/her primary duty to the court". May LJ concurred:

[T]here is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of employment may affect its weight but that is another matter.

19 It is submitted that the approach of the Court of Appeal in *Field v Leeds City Council* – that the appearance of bias as a result of the relationship between the expert and the party does not automatically disqualify the former – is preferable to the High Court's contrary view in *Liverpool Roman Catholic Archdiocesan Trustees Inc*. In the first place, it is not appropriate, as a matter of principle, to equate the position of a judge – whose role is so vital to the integrity of the legal process that the appearance of impartiality is necessary – with that of an expert witness. Secondly, the court has the ability and means to assess (and to attribute the appropriate weight, if any) to the expert witness's testimony through the normal methods of verification including cross-examination and the scrutinisation of the opinion in the light of other evidence in the case.⁴⁷ Thirdly, the court may be deprived of important evidence if an expert is automatically disqualified on the basis of his relationship (irrespective of its nature) to the party concerned. In such circumstances, the party would normally have to call an alternative expert who may not be as qualified and/or acquainted with the facts as the original expert.

46 This was pointed out in *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2003] 2 All ER 1017 at [33].

47 See *supra* n 3.

20 Even the particularly close relationship between the expert and the party in *Liverpool Roman Catholic Archdiocesan Trustees Inc* (both the party and his expert were barristers who had worked together in the same chambers for 28 years) ought not to have automatically disqualified the expert from giving evidence. It should not be a rule that every expert loses his integrity whenever there is a relationship between him and the party. The party has the right to show the court that the expert remains able to give an objective opinion. It is for the court to scrutinise such a claim irrespective of any apparent bias which may exist. In *Liverpool Roman Catholic Archdiocesan Trustees Inc*, the expert had declared that although his sympathies lay with the party, his evidence would not be affected by this relationship.⁴⁸ Rather than disqualifying the expert arbitrarily, the court ought to have considered whether it could accept this postulation in the circumstances of the case.

21 Not surprisingly, *Field v Leeds City Council* was applied by Burnton J in *Admiral Management Services Ltd v Para-Protect Europe Ltd*,⁴⁹ a case in which a question arose as to whether the employees of the claimant could testify on his behalf. The learned judge ruled that as long as the experts were sufficiently qualified, the mere fact of their employment did not bar them from giving evidence.⁵⁰ The matter was put beyond doubt by the Court of Appeal in *R v Secretary of State for Transport, Local Government and the Regions (No 8)*⁵¹ (“*Factortame*”). The case did not involve a relationship between expert and party but rather the former’s material interest in the outcome of the suit. The claimants had appointed a firm of chartered accountants (GT) for the purpose of establishing the amount of damages to which they were entitled. As the claimants had limited funds and owed money to GT, they reached an agreement whereby the latter would receive 8% of the amount of damages received. GT then appointed and funded independent experts to create a computer model for calculating the amount of losses which could be claimed. The Court of Appeal concluded that GT was not prevented by law from entering into this fee arrangement as it had not been providing litigation or advocacy services.⁵² The agreement was not contrary to public policy because it could not be construed as enticing GT to interfere with the administration of justice. As GT’s personnel did not act in the capacity of expert witnesses (they were retained as expert advisers), the contingency fee arrangement with them did not directly impact on the evidence (which had been provided by independent experts appointed

48 See the extract at para 16 of the main text above.

49 [2003] 2 All ER 1017.

50 Also see *Armchair Passenger Transport Ltd v Helical Bar plc* [2003] EWHC 367 to the same effect.

51 [2003] QB 381.

52 Therefore, s 58 of the Courts and Legal Services Act 1990 did not apply.

by GT). Furthermore, GT was not an uninterested maintainer of litigation and, therefore, the test of whether it had been guilty of “wanton and officious intermeddling with the disputes of others” was not applicable. It is also of note that the court was concerned that the agreement ensured that the claimants, who could not have otherwise afforded the litigation, would have access to justice.

22 Having resolved the case on the above grounds, the Court of Appeal assessed the position of experts under the Civil Procedure Rules. It disapproved of the High Court's view in *Liverpool Roman Catholic Archdiocesan Trustees Inc* that apparent bias is sufficient to disqualify an expert witness from giving evidence:

It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence.⁵³

23 The court went on to consider the procedure where an expert witness “has an interest of one kind or another in the outcome of the case”:

[T]his fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded
...⁵⁴

24 More specifically on the issue of contingency fee arrangements, the court stated:

To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar arrangement. Accordingly, we consider that it will be in a very rare case indeed that a court will be prepared to consent to an expert being instructed under a contingency fee agreement.⁵⁵

53 *Supra* n 51, at [70].

54 *Ibid.*

55 *Supra* n 51, at [73].

25 Is a Singapore court likely to apply the above principles? If so, the following approach is suggested:

(a) The expert must be sufficiently qualified according to law in order to give evidence.

(b) Assuming that he is sufficiently qualified to be an expert, the court will consider whether he appreciates his overriding duty to the court (pursuant to O 40A r 2 of the RC) to give a true and uninfluenced opinion. Accordingly, if the court believes that the expert witness is unable to comply with this duty, he should not be permitted to give evidence.

(c) How is the court to determine whether the expert witness will conform with this duty? Ideally, in the interest of justice, expedition and economy, this decision should be made before the trial in the course of a pre-trial conference. Sufficient information will have to be provided to the court (including, in particular, the expert report, related documents and details as to his interest, if any).⁵⁶

(d) The court will not prohibit an expert witness from testifying merely because of an existing relationship with the party concerned or an interest in the outcome of the case. The court will take all the circumstances of the case into account in determining whether the expert is able to fulfil the duty imposed by the RC. However, it would be a “very rare case indeed” for the court to countenance a contingency fee arrangement.⁵⁷

(e) As the decision at the pre-trial conference to permit the expert to give evidence would not prevent the trial judge from rejecting his evidence or limiting its weight (see (f) below), the decision should be in favour of admitting the expert unless the court is satisfied on the evidence before it that he would not be able to comply with his duty.

56 See main text at para 14 above. For a case where insufficient information was presented to the High Court, see *Field v Leeds City Council* (considered above at para 18 of the main text).

57 *Factortame*, *supra* n 51, at [73]. Note that para 11.3 of “CPR Code of Guidance for Experts and those instructing them” (referred to in n 68 *infra*) states:

Payments conditional or contingent upon the outcome of the case must not be offered or accepted because such terms may be seen to compromise the expert’s fundamental duty of independence.

(f) A decision prior to trial to allow a witness to give expert evidence should not prevent the trial judge from rejecting the expert's evidence or limiting its weight as is appropriate. Circumstances at trial (brought up in cross-examination and by other evidence) may reveal that the expert is not as objective as expected.

(g) In *Factortame*, the Court of Appeal pointed out that one of the considerations in determining whether or not to permit the expert to give evidence is the consequence of his exclusion, as when an alternative expert cannot be found or would not be as effective as the original choice. However, if the court is satisfied that the original expert is not capable of complying with his duty, he must be excluded irrespective of the circumstances in the interest of the administration of justice.

VI. Further reform necessary?

26 The adversarial system assumes that experts will conflict when their differences of opinion are honest. Ideally, the expert is selected not because he is willing to take the party's side, but because his professional viewpoint supports that party's case. More often than not, experts in a particular field share the same or similar views because of their common training and access to the same pool of knowledge. Therefore, it is fair to say that most cases involving expert testimony should not involve a conflict of opinions. Unfortunately, in practice, such conflicts are frequent not as a consequence of a divergence in genuinely held beliefs but because of the exigencies of litigation. Quite simply, experts are generally chosen to help the parties win their causes rather than to assist the court in the interest of the administration of justice.

27 Judicial exhortations and declarations of principle alone are unlikely to stem this problem if the expert believes that he can avoid liability and sanctions. Rules which merely describe obligations are not sufficient even on pain of imprisonment. Take, for example, s 191 of the Penal Code, which provides that it is a criminal offence for someone to state "that he believes a thing which he does not believe".⁵⁸ It is notoriously difficult to successfully prosecute an expert who is able to manipulate the evidence to show that there is some basis for a belief which he dishonestly claims to hold.⁵⁹ Indeed, it is not surprising that there are no cases involving perjury by an expert witness in Singapore and an extremely limited number in other jurisdictions.

58 See *supra* n 26 and the corresponding main text at para 9 above.

59 See Section II of the main text above, "Problem of expert partiality" for a fuller discussion of the problem.

28 It may be too early to gauge whether the formulation of the expert's overriding duty to the court⁶⁰ and requirements concerning the expert's report⁶¹ in O 40A will have the desired effect. Recent judicial reminders⁶² indicate that additional measures may be necessary. Although the expert is now made aware of his duty to be objective by being required to state in his report that he believes in the correctness of his opinion and that he understands, and complies with, his duty to the court, the fulfilment of this vaguely expressed responsibility needs to be clarified by directions and guidelines concerning the practical realities of the expert's role. The requirements affecting the expert report in O 40A r 3(2), important though they may be, are essentially formal in nature. For example, they do not tell him that he must consider all information which may be relevant to his opinion, that he should draw attention both to any material information to which he has not had access and any facts which weaken or contradict his opinion, that he should qualify his opinion whenever his expertise on a particular matter may be limited, that his responsibility is a continuing one so that he is obliged to inform the court and the parties if, having submitted his report, he changes his opinion in any material respect, and that he may ask for the court's assistance if he believes that he is being prevented from complying with his duty by those instructing him.⁶³

29 While all the above factors may be implied from the concept of the expert's duty to the court, this may not be sufficient to bring home to the expert himself the essence of his responsibilities. Even if these directions and guidelines were to be expressed in the RC or practice directions, their impact would depend on the willingness of lawyers to communicate them to the expert as early as possible so that he is comprehensively apprised of his role from the outset. As V K Rajah JC stated *Vita Health*, in the context of accountancy experts:

[I]t is always imperative that ... experts be apprised immediately upon their appointment, of their overriding obligation to the court. Experts ought to state in their report that they were aware of this obligation from the outset and make it amply clear if they have had any issues or problems in relation to the access to, collation and or the reliability of relevant evidence. Any reservations or qualifications they may have about the reliability of the facts being presented or assumptions made,

60 As formulated in O 40A r 2(1) and (2).

61 In particular, O 40A r 3(2)(g) and (h).

62 Particularly by V K Rajah JC in *Vita Health*, *supra* n 29, at [79] to [90].

63 Some of these considerations are set out in a practice direction which supplements Pt 35 of the CPR (para 1). In English practice, the expert is entitled to request directions from the court "to assist him in carrying out his function as an expert". (See Pt 35.14(1).)

ought to be expressly and specifically particularised in their report prior to cross-examination.⁶⁴

30 To counter the risk that a lawyer may not fully inform his expert of the scope of his duty (the rules do not impose any such obligation on the lawyer, although he does have such a responsibility pursuant to his position as an officer of the court),⁶⁵ and considering that the duty is owed to the court, it may apt to introduce a procedure whereby the notice of duty (which would include directions and guidelines)⁶⁶ is given by the court to the expert as soon as he is appointed. Indeed, to emphasise that the expert's duty is to the court, it may even be appropriate for the court to appoint the expert pursuant to such a notice entitled "Terms of appointment of expert". The expert signs the document to acknowledge his acceptance of the terms. It would also be appropriate to include a provision in this notice or the RC entitling the expert, when appropriate, to seek the directions of the court to enable him to perform his duty.⁶⁷

31 Apart from making the expert more aware of his obligation to the court and that it overrides his fealty to the party who appointed him, the arrangement between the court and the expert would be more forceful than the reliance on a protocol or professional code of guidance which some experts may take seriously and others may not.⁶⁸ It may not be too drastic to suggest that the court registry might keep a record of experts which have given testimony. Where it is clear from the record that a particular expert has been found wanting in respect of his duty, the court would be at liberty to refuse his appointment in future cases in the interest of the administration of justice. The hope is that such a procedure would compel the expert to comply with his duty to the court in his own professional interest even to the extent of counterbalancing any influence which may be exerted by the instructing party.

64 *Vita Health*, *supra* n 29, at [86]. Also see [87] to [90] in the context of the case.

65 He has the duty of assisting the court in "arriving at a just decision". See s 55(c) of the Legal Profession (Professional Conduct) Rules (2000 Rev Ed).

66 For codes of guidance now operational in England, see *infra* n 68.

67 For example, where information is being withheld from him or he is otherwise being obstructed from complying with his duty. See Pt 35.14 of the CPR, which seems to cater to such circumstances.

68 As so aptly stated by V K Rajah JC in *Vita Health* (*supra* n 29, at [86]):

All said and done, it must be acknowledged that no amount of legislation or protocols can secure the integrity of an expert. In the final analysis, it must be the expert's professionalism that illuminates and buttresses his opinion.

In England, there is the "CPR Code of Guidance for Experts and those instructing them" (available at www.academy-experts.org). For observations on this code, see *Factortame*, *supra* n 51, at [65]; *Smith v Stephens* (unreported, NLD 15 May 2001, QBD); *Peet v Mid-Kent Healthcare NHS Trust* [2001] EWCA Civ 1703. There is also the "Civil Procedure Working Party's Guide for Experts and Those Instructing Them for the Purpose of Court Proceedings" (available at www.ewi.org.uk).

32 In this proposed scheme, the expert would be appointed by the court but would continue to be instructed and paid by the party who selected him. He would no longer be referred to as the party's expert as is the present position under O 40A. Nor would he be a court expert in the sense of O 40 of the RC. Order 40, which concerns the judicial appointment of an expert ("court expert"), has limited value in its current state. It applies where the court believes that its own expert can more effectively and less expensively resolve an issue than the parties' experts whose evidence is contradictory and difficult to resolve, or where the parties do not intend to call experts but, nevertheless, the court needs expert assistance. Therefore, O 40 is residuary in nature and this is underlined by the requirement that the court must attempt to obtain the parties' agreement to the proposed expert, failing which the court is to nominate him.⁶⁹

33 Order 40 is rarely engaged because the adversarial culture is such that the courts prefer to allow the parties to select their own witnesses rather than force the issue upon them. The distinction between a "court expert" and a "party's expert" and their separation in two Orders⁷⁰ gives the unintended impression that one is independent and the other is not. It fomented an improper view about the nature of expert testimony thereby exacerbating problems discussed in this article. The time may have come to do away with the distinction between the "party's expert" and "court expert" governed by distinct Orders in favour of a process in which all experts are appointed by the court pursuant to a single Order. For this purpose, a new rule could be added to O 40A so as to incorporate the appropriate provisions in O 40.⁷¹ An expert would simply be referred to as such whether he is put forward by a party for the court's appointment or is appointed by the court on its own initiative. Order 40A would become O 40 and be entitled simply as "Experts".

69 See O 40 r 1(2).

70 See the respective titles of O 40 ("Court expert") and O 40A ("Experts of parties").

71 This is the position in the English CPR. See Pts 35.7 and 35.8 in relation to the "single joint expert".